



















A  
**TREATISE**

ON THE

**CIVIL JURISDICTION**

OF A

**JUSTICE OF THE PEACE,**

IN THE

**STATE OF NEW-YORK.**

—♦—  
**BY ESEK COWEN, ESQ.**

COUNSELLOR AT LAW.  
—♦—

**ALBANY:**

**PUBLISHED BY WM. GOULD & CO.**

LAW BOOKSELLERS,

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**AND BY GOULD & BANKS,**

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THE CITY HALL, NEW-YORK.**

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**1821.**

*Northern District of New-York, to wit :*

BE IT REMEMBERED, that on the twenty-eighth day of May, in the forty-fifth year of the Independence of the United States of America, A. D. 1821, William Gould and Company, of the said district, have deposited in this office the title of a book, the right whereof they claim as proprietors, in the following words, to wit :

“A Treatise on the Civil Jurisdiction of a Justice of the Peace, in the state of New-York. By Esek Cowen, Esq. Counsellor at Law.”

In conformity to the act of the Congress of the United States, entitled, “An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned ;” and also, to the act, entitled, “An act supplementary to an act, entitled, an act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.”

R. R. LANSING,  
Clerk of the Northern District of New-York.



## PREFACE.



THE nature and object of the following work needs no apology. The court of which it professes to treat, has had an uninterrupted existence in this state, under different titles, and with a jurisdiction more or less extensive, for nearly a century and an half. At one time it took cognizance of various matters to the value of £100 ; but in 1782, it was limited to 25 dollars, at which it remained stationary, till the year 1818, when its jurisdiction, in this respect, was enlarged to 50 dollars, in matters litigated, and to 100 dollars upon confession. Long, however, as this court has existed, universal as the acquiescence has been in the necessity of its continuance and permanency, its jurisdiction embracing a considerable portion of the litigation, in a great and commercial state ; nothing like a treatise on its power, duty and manner of proceeding has yet made its appearance. It must be obvious to every man of reflection, that a work of this kind is not only important to every citizen, but essentially requisite to justices, officers and suitors of the court : and this, in a special manner, since the late extension of its jurisdiction.—“ Its decisions daily affect the important rights of citizens. That its proceedings should be correct, and its judgments wise and lawful, must certainly be the wish of every well disposed man. That courts of justice should be conducted without rule, and decide without established principles, is, of all speculations, the most wild and pernicious. To substitute in the place of settled law, the whim, the caprice, the affection, the inclination, or what, nine times out of ten, is the same thing, the conscience of the judge, is to unhinge the long established rules of property, and to launch into a deceitful, fluctuating and dangerous sea, without a compass to steer our course, or a land mark to guide our way. To a superficial observer, the forms of proceeding, and the rules of law observed in our courts of justice, appear futile and unmeaning ; productive of delay, and the most ruinous procrastination ; at the same time indulging a shameful and contemptible chicanery. But to a reflecting mind, well acquainted with the use and foundation of judicial proceedings, and principles of law, they appear indispensable guards, established for the security of property, and protection of personal rights. A

generous, candid, honest mind, unacquainted with the refined arts of designing and unprincipled men, and not sufficiently apprized of the force of passion, affection, antipathies, and even sympathies, by which all men are more or less influenced, is very naturally led to believe, that, in case two men have a controversy, they have nothing more to do, than state their case to a third person, who, to all appearance, stands indifferent between them ; and that he, governed by no rules but his innate sense of justice, is every way competent to judge their cause. But a man better acquainted with the human heart, possessing a knowledge of the world, and, in the least degree, conversant in judicial proceedings, will at once tell you, that there is no security in this tribunal ; that the bias and affections of the umpire, will, in a large majority of cases, have an insensible influence on his mind, which nothing but the established rules of law can restrain ; that an artful, designing, insinuating party will approach him under every possible disguise, and, by wicked, and deceitful means, raise a specious, and delusive equity, which the solid rules of justice will at once put down : But which, operating on the mind of a man, who finds himself acting under no rule, governed by his own inclination, affected by prejudice, wrought upon by friendship, or influenced by passion, will continually lead him into unintentional error. He who has never been called upon to decide questions of interest, in cases where his friend, or his enemy is concerned, knows not the difficulty in separating the abstract justice of the case, from the feelings and affections of the heart. This is, however, more easily perceived and felt by the injured party.

In the organization of the courts constituted for the trial of small causes, the legislature have not authorized a departure from any known, established, legal principle of decision, but it has very much altered the manner of proceeding, requiring much less particularity and exactness, in this respect, than is required in the courts proceeding according to the course of the common law. Whether the justice, in conducting the business of his court, is to be governed by rules of practice, was a question for the legislature to decide. It has declared that he shall be governed by rules, and has, by several acts on the subject, marked out those rules with considerable exactness and precision. And the volumes of our cases upon certiorari, show the strictness by which he is tied down to the decisions of the common law. In many instances, his rules and course of practice, must be conformable to those usual in courts of record. It is obvious, then, that on the right understanding of the practice of those courts, and the principles of law by which they govern themselves in deciding controversies, so far as they apply here, must very much depend on the utility and publick convenience of the justice's courts ; as also the security of property coming within their jurisdiction.



The continual errors which many justices run into, in their proceedings, under the law which confers their civil jurisdiction, prove that they want an explanation of that law in their hands. It is impossible that it should be otherwise. A law of such magnitude cannot carry every exposition on its breast. The very terms of art made use of, have called forth folios of explanation and comment, applicable to our higher tribunals; and volumes have been written to explain and illustrate questions of not more difficulty, than those which occur every day in justices' courts. Men of the first professional abilities, do not agree in every point; much less are we to expect a uniformity of opinion from men unaccustomed to legal investigation. Such men, however, are, in the contemplation of the legislature, to carry this law into effect. Lawyers obtain knowledge from books, and justices would be more than men, if they could acquire it in any other way."\*

"I certainly shall not presume," says that great luminary of our jurisprudence, the present Chancellor of this state, "to strike out any new path, with visionary schemes of innovation and improvement; *via antiqua via est tuta*. It would, no doubt, be, at times, very convenient, and perhaps a cover for ignorance, or indolence, or prejudice, to disregard all English decisions as of no authority, and to set up as a standard, my own notions of right and wrong. But I can do no such thing. I am called to the severer and more humble duty of laborious examination and study. It was Lord Bacon, who laid it down as the duty of a judge, to draw his learning from books, and not from his own head."†

When I consider the perpetual doubts and embarrassments, which perplex and harrass the greater number of justices, while engaged in discharging the useful and laborious duties imposed upon them by the laws of this state; the importance of any effort which shall tend, in the least, to render their path, in this respect, more plain and easy, will, I am confident, be duly appreciated by those gentlemen.‡ For their use and the use of

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\* Most of the above observations, marked as quoted, are either suggested by, or taken *verbatim* from the preface to Judge Pennington's excellent treatise on the justice's court of New-Jersey. I have therefore added a quotation for the whole.

† 1 John. Ch. Rep. 530.

‡ I have observed, for a few years past, while attending the Supreme Court at Albany, that a considerable share, and in several instances, I think, a majority of the causes which have occupied the large calendar of that court, at their January and August Terms, are brought there by certiorari from a justice's court.

those officers who serve their process, and persons who may be suitors in their courts, are the following pages primarily intended. In a work of such a variety and extent, a reference to the authorities from which the matter is collected, was found essential for my own conduct in travelling through so large a field of investigation. To render these references, at the same time, of as much utility as possible, I have, where it was practicable, referred to such approved elementary treatises, as contain quotations of the original reports, or other authorities establishing the principles advanced. I have then brought down each particular head, by a direct reference to such late English and American reporters, as are not noticed in the elementary treatise quoted; or rather, such cases given by those reporters, as I thought of any practical use to the magistrate. As a majority of the law libraries in the state, are probably composed, principally, and many of them, almost exclusively, of these elementary works, a greater number of justices will thereby be enabled to avail themselves of the known liberality of their neighbours of the profession, by examining the books thus referred to, in order to obtain, where necessary, still more ample instruction upon the point before them. By endeavoring thus to trace the principle advanced as near as possible to its original source, it will enable them to supply defects and correct those errors which may have intervened in the following treatise. To facilitate such researches, when they have the means in their power, I have prefixed an "*explanation of abbreviations used in references to law books, &c.*" published in CLARKE'S *Bibliotheca Legum*—London, 1819: adding thereto, *an explanation of abbreviations used in references to American law books*, in the course of the work.

In exemplifying any principle advanced, I have generally pursued the more usual course of authors, by giving a brief outline of the facts contained in the case itself, as reported, or stated, in the author referred to. To this remark, there will, however, be found many exceptions. And where I supposed the case so complicated and technical as to confound the general reader, I have usually dismissed it at once, and drawn the illustration directly from common life.

I cannot but persuade myself, that this book will also be found useful to the man of business, as well as the justice; and this, not only on account of the instruction it contains concerning the structure and mode of enforcing most of the contracts in civil life; but because a very great proportion of his credits are many times the subject of collection in a justice's court.—Besides, his extensive commercial intercourse with mankind, frequently leads to controversies, which are to be litigated there. And as professional assistance is sometimes obtained with great difficulty, and is always burthensome to the suitor,



in a court where no compensation therefor can be taxed against the party in the wrong, prudence would seem to dictate some preparation to manage his causes in person. Indeed, his rights would often be materially impaired, perhaps lost entirely, by a neglect of this duty.

A judge, who ranks among the first for learning and judicial experience of any in the state, not to say in the United States, on looking over those pages of the work devoted to general law, gave it a still higher character ; and was pleased to remark in his note to the bookseller, that he also thought it a book of reference highly valuable to his brethren of the profession. He probably founded his opinion upon the numerous quotations which he observed, made from the late English and American reporters, not brought down to this time by other books of reference. Should the sphere of its usefulness be thus enlarged, beyond the author's primary design, it will be peculiarly gratifying to his feelings. The work will then be in the hands of a class of gentlemen, fully competent to appreciate the difficulty and labour of its execution, and who will look with an indulgent eye upon those errors, which he cannot pretend to have entirely avoided. Should it answer the elevated purpose of facilitating research in the useful, and, as Sir Edmund Burke justly styles it, "NOBLEST" of professions, that of our country's LAWS ; besides gratifying that ambition to be useful to his fellow citizens which the author acknowledges to have felt, the being tributary to such an end, will, at the same time, accord with those feelings of respect and confidence, which he is proud to avow, towards the enlightened and liberal members of the AMERICAN BAR.

*Saratoga Springs, June 30th, 1821.*

# EXPLANATION

OF

ABBREVIATIONS USED IN REFERENCES TO ENGLISH LAW BOOKS, &c.

A. (a.) B. (b.)	A. front, B. back of a leaf
Ab. Sh.	Abbot's shipping
Abr. Ca. Eq.	Abridgment of cases in equity
A. An. Anon.	Anonymous
A. B.	Anonymous, at the end of Benloe, Rep. 1661
Acc. or Ag. or Agr.	Accord or agrees
Act.	Acton's reports
Act. Reg.	Acta Regia
Al.	Aleyn's reports
Amb.	Ambler's reports
Annaly.	Reports time Hardwicke
And.	Anderson's reports
Andr.	Andrew's reports
Anst.	Anstruther's reports
Ass.	Assise (book of)
Ast. Ent.	Aston's entries
Atk.	Atkyn's reports
Ayl.	Ayliffe
Bac. abr.	Bacon's abridgment
B. & A. or Barn. & Ald.	Barnewall & Alderson's reports
Banc. Sup.	Upper bench
Barn. K. B.	Barnardiston's reports K. B.
Barn. C.	Barnardiston's reports chancery
Barnes.	Barnes's notes C. P.
Benl. Bendl.	Benloe or Bendloe's reports
B. Tr.	Bishop's trial
Bl.	Blount
W. Black.	Sir Wm. Blackstone's reports
H. Black.	Henry Blackstone's reports
Bla. Com.	Blackstone's commentaries
Bo. R. Act.	Booth's real actions
B. & P. or Bos. & Pull.	Bosanquet and Puller's reports
Bott.	Bott's poor laws
Bra.	Brady or Bracton
Bridg.	Bridgman's Rep. or Conv.
Br. Bro.	Brooke, Browne, Brownlow
Bro. Ab.	Brooke's abridgment



Br. Brev. Jud. & Ent.	Brownlow Brevia Judicial, &c.
Bro. Brow. Ent.	Brown's entries
Bro. V. M.	Brown's vade mecum
Brown P. C.	Brown's parliament cases
Brown C. R.	Brown's chancery reports
B. N. C.	Brooke's new cases
Brownl. Rediv. or Ent.	Brownlow's redivivus
Brownl.	Brownlow and Gouldesborough's reports
B. or C. B.	Common bench
B. R.	King's bench
Buck.	Buck's reports in bankruptcy
Bulst.	Bulstrode's reports
Bunb.	Bunbury's reports
B. Just.	Burn's justice
B. Eccl. Law.	Burn's ecclesiastical law
Burr.	Burrow's reports
Burr. S. C.	Burrow's settlement cases
C.	Codex (Juris Civilis)
C. C.	Cases in chancery
Cald.	Caldecott's reports
Ca. temp. H.	Cases time Hardwicke
Ca.	Case, or placita
Ca. T. K.	Cases time King
Cal.	Callis, Calthrope
Camp. N. P.	Campbell's reports Nisi Prius
Cart.	Carter's reports
Cary.	Cary's reports
Carth.	Carthew's reports
Cas. T. Talb.	Cases time Talbot
Cas. Pra. C. P.	Cases of practice common pleas
Cas. B. R.	Cases temp. W. III. (12 Mod.)
Cas. L. Eq.	Cases in law & equity (10 Mod.)
C. B. or C. P.	Common Pleas
Ca. P. or Parl.	Cases in parliament
Cawl.	Cawley
Ch. Cas.	Cases in chancery
Ch. Pre.	Precedents in chancery
Ch. R.	Reports in chancery
Chris. B. L.	Christian's bankrupt laws
Clay.	Clayton's reports
Cl. Ass.	Clerk's assistant
Clift.	Clift's entries
Cod. or Cod. Jur.	Codex by Gibson
Co. Cop.	Coke's copyholder
Co. Ent.	Coke's entries
Co. Lit.	Coke on Littleton (1 Inst.)
Co. M. C.	Coke's magna charta (2 Inst.)
Co. P. C.	Coke's pleas of the crown (3 Inst.)

Cor. on Courts.	Coke's 4 Inst.
Comb.	Comberbach's reports
C. P.	Common Pleas
Com.	Comyn's reports
Com. Dig.	Comyn's digest
Cont.	Contra
Cooper	Cooper's reports
Co.	Coke's reports
Cooke B. L.	Cooke's bankrupt laws
Cot.	Cotton
Cow.	Cowper's reports
Cox.	Coxe's reports
Cro. (1, 2, 3.)	Croke (Eliz. Jam. Cha.)
Cro. <i>sometimes refers to</i> Keilway's Reports, pub- lished by Serj. Croke.	
Cromp.	Crompton on courts
Cunn.	Cunningham's reports
D.	Dictum, digest. (Juris Civilis)
Dal.	Dalison's reports
Dalt.	Dalton's justice or sheriff
D'An.	D'Anvers' abridgment
Dan.	Daniel's reports
Dav.	Davy's reports
Dick.	Dickin's reports
Dick. Just.	Dickinson's justice
Dig.	Digest of writs
D & S.	Doctor and student
Dod.	Dodson's reports in admiralty
Dom. Proc.	Domini proctor ; cases house of lords
Doug.	Douglas' reports
Dow.	Dow's reports in parliament
Dugd. orig.	Dugdale's origines
Dug. S.	Dugdale's summons
Duke.	Duke's charitable uses
Durnf.	Durnford & East, or Term re- ports
Di. Dy.	Dyer's reports
Dub.	Dubitatur
E.	Easter Term
East.	East's reports
East. P. L.	East's pleas crown
Eden.	Eden's rep. of Northington's cases
Edw. A. R.	Edward's admiralty reports
Eq. Ca.	Equity cases abridged
E. of Cov.	Earl of Coventry's case
Esp.	Espinasse's rep. or digest N. P.
Exp.	Expired



Far.	Farresley (7 Mod. Rep.)
Ff. *	Pandectæ (Juris Civilis)
Fin.	Finch's reports
F. or Fitz. †	Fitzherbert
F. N. B.	Fitz. Nat. Brevium
Fitz-G.	Fitz-Gibbon's reports
Fl.	Fleta
Fol.	Foley's poor laws
Fonbl.	Fonblanque on equity
For.	Forrest's reports
For. Pla.	Brown's Formulæ
Forrester	Cases time of Talbot
Forts.	Fortescue's reports
Fost. Forts.	Foster's reports
Fra. M.	Francis' maxims
Freem.	Freeman's reports
Gilb. C. P.	Gilbert's common pleas
—— Dist.	—— distresses
—— Ex.	—— executions
—— Ev.	—— evidence
—— Exch.	—— exchequer
—— K. B.	—— king's bench
—— Rem.	—— remainders
—— Us.	—— uses
Gilb.	—— cases in law and equity
Godb.	Godbolt's reports
Godol.	Godolphin
Golds.	Goldsborough's reports
Gro. de. j. b.	Grotius de jure belli
Hans.	Hansard's entries
Hard.	Hardres's reports
Hawk. P. C.	Hawkins's pleas of the crown
H. H. P. C.	Hales's Hist. Plac. Cor.
H. P. C.	Hales's Pleas crown
Her.	Herne
Het.	Hetley's reports
H. or Hil.	Hilary term
Hob.	Hobart's reports
Holt.	Holt's reports
Hugh.	Hughes's entries

\* This reference, which frequently occurs in Blackstone and other writers, applied to the Pandects or Digests of the civil law, and is a corruption of the Greek letter  $\alpha$ . Vide Calvini Lexicon Jurid. voc. Digestorum.

† Fitzherbert's abridgment is commonly referred to by the older law writers, by the title and number of the placita only, e. g. Coron. 30.

Hut.	Hutton's reports
Imp. K. B.	Impey's practice K. B.
— C. P.	— practice C. P.
— Sh.	— sheriff
— Pl.	— pleader
Jan. Angl.	Jani Anglorum
Jenk.	Jenkins's reports
1, 2, Inst.	(1, 2.) Coke's Inst.
Inst. 1, 2, 3.	Justinian's Inst. lib. 1. tit. 2. sec. 3
Jon. 1, 2.	Jones W. & T. reports
Jud.	Judgments
Keb.	Keble's reports
Kel.	Sir John. Kelynge's reports
Kel. 1, 2.	Wm. Kelynge's rep. 2 parts
K. B.	King's bench
K. C. R.	Rep. <i>tem.</i> King C.
Keilw. Kel.	Keilwey's reports
Ken.	Kennet
Kit.	Kitchin.
Lamb.	Lambard
La.	Lane's reports
Lat.	Latch's reports
Leach.	Leach's crown law
Leon.	Leonard's reports
Lev.	Levinz's reports
Ley.	Ley's reports
Lex. Merc. Red	Lex mercatoria by Beawes,
Lib. Ass.	Liber Assisarum, Year Book, pt. 5.
Lib. Reg.	Register book
Lib. Feud.	Liber Feudorum, usually printed at the end of the Corpus Juris Civilis
Lib. Intr.	Old Book of entries
Lib. Pl.	Liber Placitandi
Lit. Abr.	Lilly's practical register
Lit.	Lilly's reports or entries
Lit.	Littleton's reports
Lind.	Lindewood
Lit. with S.	Littleton, S. for section
Lott.	Lott's reports
Long. Quinto.	Year book pt. 10.
Lut.	Lutwyche's reports
M. & S. or Mau. & Sel.	Maule & Selwyn's reports
Madd.	Maddock's reports
Madd. Ch.	Maddock's chancery practice
Mad.	Madox's exchequer & formulare
Mal.	Malyne's lex mercatoria
Manw.	Manwood's forest laws



Mar.	March's reports
Marsh.	Marshall's reports
Mer. or Meriv.	Merivale's reports
M. Mich.	Michaelmas term
Mitf.	Mitford's pleadings
Mod. Ca.	Modern Cases
Mod. c. l. & eq. 1, 2	Modern cases in law and equity, (8 & 9 Mod. Rep.)
Mod. Int. 1, 2.	Modus Intrandi, 1, 2.
Mod. Rep.	Modern reports
Moll.	Molloy's de jure maritimo
Mo.	Moore's reports
N. R.	New reports by Bosanquet and Puller
N. Benl.	New Benloe
N. L.	Nelson's Lutwyche
Nol. Sett.	Nolan's settlement cases
North.	Northington's reports
N. Nov.	Novellæ (Juris Civilis)
No. N.	Novæ Narrationes
O. Benl.	Old Benloe
Off. Br.	Officina brevium
Off. Ex.	Office of executors
Ord. Cla.	Orders, lord Clarendon's
Ord. Ch.	Orders in chancery
Ow.	Owen's reports
Pal.	Palmer's reports
Par.	Parker's reports
Pea.	Peake's reports N. P.
P. Pas.	Easter term
Pl. Pla. P. p.	Placita
P. C.	Pleas of the crown
P. W.	Peere Williams's reports
Perk.	Perkins's conveyances
Phillim.	Phillmore's reports
Pig.	Pigot's recoveries
Pl. Com.	Plowden's com. or reports
Pol.	Pollexfen's reports
Poph.	Popham's reports
2 Poph.	Cases at the end of Popham's rep.
P. R. C. P.	Pract. register in com. pl.
Pr. Reg. Ch.	Pract. register in chancery
Pr. Ch.	Precedents in chancery
Pres. Conv.	Preston's conveyancing
Pres. Abs.	Preston's on abstracts
Pres. Es.	Preston on estates
Price or Pr.	Price's reports

Priv. Lond.	Privilegia Londini
Pr. St.	Private statute
Quinti Quinto*	Year Book, 5 Hen. V.
Q. War.	Quo warranto
R.	Resolved, repealed
Rast.	Rastell's entries and statutes
Ld. Raym.	Lord Raymond's reports
Raym. 1.	Sir Thomas Raymond's reports
Raym.	Raymond
Reg. Brev.	Register of writs
Reg. Pl.	Regula Glacitandi
Reg. Jud.	Registrum Judiciale
Rep. (1, 2, &c.)	1, 2, Coke's rep. &c.
Rep. Eq.	Gilbert's rep. in equity
Rep. Q. A.	Rep. temp. q. Anne
Rep. temp.	Finch's reports
Finch	
Rob.	Robinson's entries
Rob. A.	Robinson's reports admiralty, or Robertson's rep. of appeals
R. S. L.	Reading statute law
Rose	Rose's reports
Roll. & Roll.	Rolle, Rep. and Abridgment
Abr.	
Roll.	Roll of the term
Rush.	Rushworth's collections
Ry. F.	Rymer's Fœdera
Salk.	Salkeld's reports
Sal.	Savile's reports
Saund.	Saunders's reports
S. §.	Section
Selw. N. P.	Selwyn's Nisi Prius
S. B.	Upper bench
S. C.	Same case
Sch. & Lef.	Schoales and Lefroy's reports
Sect.	Section
Seld.	Selden
Sel. Ca.	Select cases
Sem.	Semble, seems
Sess. ca.	Sessions, cases
Show.	Shower's reports
Shower's P. C.	Shower's parliament cases
Sid.	Siderfin's reports
Skin.	Skinner's reports
Smith.	Smith's reports
Som.	Somner, Somers
Spel.	Spelman

\*V. 5 Hen. VII. 19, 24.



S. P.	Same point
S. C. C.	Select chancery cases
Stark. N. P.	Starkie's reports
Stark. C. L.	Starkie's criminal law
Stat. W.	Stat. Westminster
Staunf. St. P. C. & Pr.	Staunforde pleas, & prerogative
Stra.	Strange's reports
Sty.	Style's reports
St. Tri	State trials
Swans.	Swanston's reports
Swin.	Swinburne on wills
Taun.	Taunton's reports
Th. Dig.	Theloall's digest
Th. br.	Thesaurus brevium
Toth.	Tothill's reports
T. R.	Teste Rege
T. R.	Term reports
T. R. E. or T. E. R.†	<i>Tempore Regis Edwardi.</i>
Tr. Eq.	Treatise of equity
Trem.	Tremaine, pleas of crown
Trin.	Trinity term
Vaugh.	Vaughan's reports
Vent.	Ventris's reports
Vet. entr.	Old B. entries
Vet. n. br.	Old Nat. brev.
Vern.	Vernon's reports
Ves.	Vesey's, sen. or jun. reports
V. & B. or Ves. & Bea.	Vesey and Beames's reports
Vid.	Vidian's entries
Vin. abr.	Viner's abridgment
Wats.	Watson
Wat. Cop.	Watkins's copyholds
Went. E.	Wentworth's executor
W. 1. W. 2.	Statutes Westminster, 1, 2.
Win.	Winch's reports
Wight.	Wightwicke's reports
Wils.	Wilson's reports
Wms. Just.	Williams's justice

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† This abbreviation is frequently used in Domesday book, and in the more ancient law writers. See Tyrrel's Hist. Eng. Introd. v. iii. 49. See also Cowel's Dict., verb. Reveland, where notice is taken of a wrong inference of Ld. Coke's, 1 Inst. 86, from a quotation of Domesday book, where this abbreviation is interpreted, Terri Regis Edwardi.

Wms:

Williams's rep. or Peere Williams

Y. B.\*

Year books

Yelv.

Yelverton's reports

## EXPLANATION

## ABBREVIATIONS USED IN REFERENCES TO AMERICAN LAW BOOKS, &amp;c.

Addison's Rep.

Addison's reports, Pennsylvania.

Ad. Rep.

Admiralty reports, by Peters,  
District Courts, U. S.

Ante.

Refers to a preceding page of the  
same work.

Anth. N. P. Rep.

Anthon's *Nisi Prius* reports, New-York.

Bay, or Bay's Rep.

Bay's reports, South Carolina.

Bee's Ad. Rep.

Bee's Admiralty reports, District  
of South Carolina.

Binney, or Binney's Rep.

Binney's reports, Pennsylvania.

Br. ed.

Bradford's edition of the Colonial  
laws, New-York.

Browne's Rep.

Browne's reports, Pennsylvania.

Burr's Tr. by Rob.

Burr's trial, reported by David  
Robertson.

Caines, or Caines' Rep.

Caines' reports, New-York.

Caines' cas. err.

Caines cases in error, New-York.

Call.

Call's Virginia reports.

Cam. &amp; Norw. Rep.

Cameron and Norwood's reports,  
North Carolina.

C. or ch.

Chapter.

Ch.

Chancery or chapter.

Chipman's Rep.

Chipman's reports, Vermont.

Cit. H. Record.

City Hall Recorder, New-York.

Coleman.

Coleman's cases of practice, New-York.

Conn. Rep. N. S.

Connecticut reports, new series.

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\* The Year-Books are usually referred to by the year of each king's reign, the initial letter of his name, and the page and number of the *Placita*; to which is sometimes prefixed the initial letter of the term, e. g. M. 4 H. 7. 18. 19.

- Coxe's Rep.  
 Cranch.  
 Dall. Rep.  
 Day, or Day's Rep.  
 Des. or Des. Eq. Rep.  
 Dun. N. Y. pract.  
 Federalist.  
 Gall. Rep.  
 Griffith's treat.  
 Hall's Ad.  
 Hall's L. J.  
 Harris & McHenry's Rep.  
 Hayw. Rep.  
 Hen. & Munf. Rep.  
 John. cas.  
 John. Ch. Rep.  
 J. & V.  
 John. or John. Rep.  
 Jud. Rep.  
 K. & R.  
 Kirby, or Kirby's Rep.  
 L. U. S.  
 Lex Merc. Am.  
 Mason, or Mason's Rep.  
 Mass. Rep.  
 Med. Jur.  
 Munf. or Munf. Rep.  
 N. R. L.  
 N. Y.  
 N. Y. Just.  
 Nile's Reg.  
 Penn. Rep.  
 Penn. on sm. causes.  
 Peters' Rep.  
 Coxe's reports, New-Jersey.  
 Cranch's reports, United States.  
 Dallas' reports, Pennsylvania.  
 Day's reports, Connecticut.  
 Dessaussure's equity reports, S. Carolina.  
 Dunlap's New-York practice.  
 Federalist, by Hamilton, Jay and Madison.  
 Gallison's reports, U. S. District court, 1 District.  
 Griffith's treatise on, a justice's court, New-Jersey.  
 Hall's practice of the court of Admiralty, U. S.  
 Hall's American law journal.  
 Harris and McHenry's reports, Maryland.  
 Haywood's reports, North Carolina.  
 Hening & Munford's reports, Virginia.  
 Johnson's cases, New-York.  
 Johnson's chancery reports, New-York.  
 Jones and Varick's edition of laws, New-York.  
 Johnson's reports, New-York.  
 Judicial repository, do.  
 Kent and Radcliff's edition of laws, New-York.  
 Kirby's reports, Connecticut.  
 Laws of the United States.  
 Law merchant of the U. States.  
 Mason's reports, circuit court, 1st circuit, U. S.  
 Massachusetts reports.  
 Medical jurisprudence, Philadelphia.  
 Munford's reports, Virginia.  
 New revised laws, New-York, by Yates and Woodworth, 1813.  
 New-York.  
 New-York justice.  
 Niles' weekly register, Baltimore.  
 Pennington's reports, New Jersey.  
 Pennington on small causes, New-Jersey.  
 Peters' reports, circuit court, U. States.



Post.	Refers to a subsequent part of the same work.
Reeve's Dom. Rel.	Reeve's domestic relations, Connecticut.
Root, or Root's Rep. s.	Root's reports, Connecticut. Section.
Serg. & R's Rep.	Sergeant and Rawle's reports, Pennsylvania.
Sess.	Session.
S. & L.	Smith and Livingston's edition of Colonial laws, New-York.
South. Rep.	Southard's reports, New Jersey.
Tayl. Rep.	Taylor's reports, North Carolina.
Tenn. Rep.	Tennessee reports.
Tyler's Rep.	Tyler's reports, Vermont.
U. S.	United States.
V. S.	Van Schaack's edition of Colonial laws, New-York.
Virg. cas.	Virginia cases.
Wash. Rep.	Washington's reports, Virginia.
Wheaton's Rep.	Wheaton's reports, U. States.
Yeates' Rep.	Yeates' reports, Pennsylvania.

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# A TREATISE, &c.



## CHAPTER I.

### OF THE JURISDICTION OF THIS COURT.

This relates *first* to the Justice. His territorial jurisdiction is of course co-extensive with the county for which he is appointed, *(a)* but an inn, or tavern keeper, or one living in a house where an Inn or tavern is kept, has no power to try any cause, though it is conceived that he may *issue execution* upon a judgment rendered by him, before he becomes such innkeeper, or commences his residence in a tavern. *(b)* He has however, no power *to try* a cause, though his removal into a tavern be after the suit is commenced. *(c)* And as he wants jurisdiction in these cases, the judgment will be reversed, even if no objection be made in the court below. *(d)* And, although he may have no licence, yet if he *in fact* keep a tavern, it is the same as if regularly authorized by licence. *(e)*

It seems that the jurisdiction of a Justice is not questionable on *certiorari*, upon the ground that he is a minister of the gospel, and therefore constitutionally disqualified to hold the office, *(f)* nor is it an objection to his trying a *qui tam* action, that he resides, in the town for whose benefit a part of the penalty is going; his interest in this case being too remote to operate as a legal disqualification; as in an action for selling spiritous liquor, without licence. *(g)*

*Secondly*, to the action. The actions cognizable before a Justice are debt, detinue, covenant, trespass on the case and trespass. *(h)*

Actions of debt are brought 1. On contracts under seal. to pay a stated sum of money in which case covenant will also gen-

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*(a)* Pennington or small causes 16.

*(b)* I. N. R. L. 397. s. 13. 2  
Caines, 103.

*(c)* 8 John. 409.

*(d)* 13 John. 213.

*(e)* Id.

*(f)* 9 John. 135.

*(g)* 11 John. 76. 1 Day 278.

*(h)* I. N. R. L. 387. s. 1.

erally lie. 2. On a judgment. 3. For various penalties imposed by statute ; but this is confined to statutes passed by the state legislature ; he having no jurisdiction under a penal law of the United States, even though such law should expressly confer jurisdiction upon him.(i) 4. On promises express or implied to pay money, in which cases an action of trespass on the case upon an *assumpsit* is preferable, as we shall see hereafter.

The action of *detinue* is brought to recover some specific chattel *itself*, unlawfully detained, but has been superseded by the action of *trover*, which goes merely for the *value* of the chattel. *Detinue* is now rarely heard of in any court.

The action of *covenant* is brought for the breach of any *executory contract under seal*, with the exception perhaps of a bond, on which debt should be uniformly brought.

The action of trespass on the case is generally brought 1. For the breach of a parol contract. This is the action of *assumpsit*. 2. For the unlawful conversion of the personal property of the plaintiff. This is the action of *trover*. 3. For a breach of warranty, or a deceit in the sale of personal property. 4. For acting contrary to a trust reposed, either in case of the bailment of goods, or in the line of ones profession or trade. 5. For negligently or wrongfully doing some positive act, by which another is consequentially injured in person, health or property ; or the omission to do any act required by law, where the omission produces injury. When the act done produces the injury it is technically called *misfeasance* ; where the act omitted, *nonfeasance* ; And the action for either is distinguished by the name of actions of trespass on the case, and are the only ones which are properly so called, from the circumstance that in declaring for these injuries the plaintiff is bound to state his case specially and at large in his declaration, shewing fully the particular manner of the injury happening.

Under this head the statute excepts from his jurisdiction actions where the title to land shall in any wise come in question, actions of slander, and malicious prosecution.(j) And it has been decided that he has no jurisdiction of an action on the case for bringing a vexatious suit in the court of Chancery ;(k) nor for the costs of going to Albany to swear to an answer in Chancery in such suit ;(l) neither has he jurisdiction of an action either for a malicious publick prosecution by indictment(m) or otherwise, or for a vexatious private suit between party and party.(n) And where the title to land comes in question, ei-

(i) 17 John. 4.

(j) 1. N. R. L. 387.

(k) 2 Caines, 171.

(l) *id.*

(m) 1 John. Cas. 130.

(n) 10 John. 106.



ther directly or collaterally, even though the parties try the title by consent, the proceeding to such trial would be erroneous, for the agreement of parties cannot confer jurisdiction(o)

But his jurisdiction extends to an action on the case for enticing away the plaintiff's wife ;(p) to an assault and battery committed upon his servant ;(q) and so to an agreement to open a fence and remove a road, for this has no reference to the title of land ;(r) to an action on the case for an escape against the Sheriff ;(s) and for negligently but unintentionally firing a pistol, by which the plaintiff is hurt, though it would be otherwise if intentional, for then the action should be assault and battery.(t)

Trespass lies for a direct injury, either to real or personal property. Of this the justice has jurisdiction except actions of replevin, and trespass as to the person, viz. the actions of assault and battery and false imprisonment, which are expressly excepted by the statute.(u) This is the proper action for mesne profits consequent upon a recovery in ejectment, in which case a justice has jurisdiction, where the plaintiff does not claim damages for a time anterior to the demise laid in the declaration in ejectment.(v)

A justice has jurisdiction of the above actions, subject to the exceptions above mentioned, and except also actions wherein the people of this state are concerned ;(x) and this whether the cause of action arise in his county or not. In some instances, however, the cause of action itself is said to be local, as where from the nature of things it must arise in a particular place. — Trespass on lands, and an action of debt upon a lease for rent, brought by the assignee or devisee of the lessor against the lessee, are instances, and it is said that in these cases the action must be brought in the county where the trespass is committed ;(x) and this is without doubt the doctrine as to our Supreme Court. But whether a man may protect himself from responsibility for a local injury, by removing from one county to another, and indeed, whether the doctrine of local jurisdiction is applicable to a court of common pleas or justices' court, may well be doubted, especially since the determination in a neighbouring state, on a statute similar to ours in this particular, expressly recognizing the right of a justice to try an action for a trespass on land committed in a foreign county.(y) Some actions are moreover rendered local, by the positive provisions of our statute. Thus it is declared that all actions of

(o) Griffeth's treatise, 19. 20.

(p) 3 John. 461.

(q) 1 Pennington's Rep. 111.

(r) 10 John. 109.

(s) 9 John. 369.

(t) 14 John. 433.

(u) I. N. R. L. 387. s. 1.

(v) 11. John. 405.

(w) I. N. R. L. 387. s. 1.

(x) Pennington, on small causes, 17.

(y) 15 Mass. T. R. 280.

trespass, and upon the case, &c. brought against any sheriff, coroner, justice of the peace, mayor, recorder or alderman, bailiff, constable, marshal, collector or overseer of the poor, and their deputies, or any of them, or any other person, who in their aid, or assistance or by commandment, do any thing touching his or their office, for or concerning any matter or thing, by them, or any of them done by virtue of their office, *shall be laid* in the county where the trespass or fact be done and committed, and not else where. (z)

This statute does not extend to cases where one does an act *by colour of his office*, which he has no right to do, for then he is subject to a suit the same as any other person ; without regard to local jurisdiction ; but the cases intended are, where one does an act *by virtue of his office*, which he has a right to do, and acting thus within the limits of his authority, he exercises it improperly, or abuses the confidence which the law reposes in him. As if a sheriff make a false return. He has a right to make a return, and in doing so acts within the bounds of his authority ; but his return being false, he is liable to an action, and the action is made local by the statute ; and unless it be laid in the county where the act is done, and proved to be so by the plaintiff, he must be nonsuited on the trial. (a)

*Thirdly.* As to parties, a justice has jurisdiction of every person found in the county, whether a resident or not. But this, in general, is only where the party is to be sued in his own right, and not in the right of another, as an executor or administrator defendant ; (b) and, in this case, even if he confess judgment, it will not confer jurisdiction. (c) A corporation may sue, (d) but cannot be sued before a justice. (e) Attornies and counsellors at law are privileged only during the session of the respective courts in which they are licensed ; (f) but during that time they are also exempt from the service of process, even though it be returnable after the expiration of the term. (g) A sheriff has no privilege against being sued in this court for an escape. (h)

On this head the Supreme Court have declared generally, that inferior jurisdictions, proceeding according to the course of the common law, are confined strictly to the authority given them. They can take nothing by implication, but must show their power expressly given in every instance. Accordingly,

(a) 1. N. R. L. 155.

(a) 15 John. 267.

(b) 1. John. cas. 228. 1 Caines, 191.

(c) 3 Caines, 129.

(d) 7 John. 356.

(e) 5 John. 347. 7 John. 356.

(f) 1. N. R. L. 345.

(g) 15 John. 242.

(h) 9 John. 369.

until expressly authorised by the act, (i) a justice had no power to proceed to judgement against joint debtors, unless all were first served with process, or brought into court. (j)

*Fourthly.* As to the sum or amount of which the justice has jurisdiction, if the plaintiff state his demand at upwards of twenty-five dollars, or fifty dollars, under the act extending a justice's jurisdiction; but claims damages to twenty-five, or fifty dollars only, the justice is not by this ousted of his jurisdiction, (k) and where the amount of a note or other claim exceeds a justice's jurisdiction, the party may relinquish by indorsement, credit, or otherwise, sufficient to bring the sum within the necessary compass. (l) And so, though the plaintiff go for two or four hundred dollars, provided he claim in damages, or by way of balance, the sum of twenty five, or fifty dollars only, according to the act under which he sues. (m)

The total want of jurisdiction, renders the whole proceeding before the justice void, and he is accountable in an action for any injury arising from his acts. (n) As if he should try a cause while he is a tavern keeper, or an action of an assault and battery, and in either case renders judgment, on which execution issues and the body or property is taken; the magistrate is a trespasser. (o) For it is a clear principle that every tribunal, proceeding under special or limited powers, decides at its peril. Without jurisdiction their proceedings are void, "and void things are as no things." Every person concerned in executing them is a wrong doer, (p) and even consent of parties will not give jurisdiction, though it will take away error. (q) But there are exceptions to this doctrine, as in case of mere privilege of an attorney or counsellor, which must be pleaded in abatement, otherwise the justice may disregard it.

Some other matters not reducible to the above heads, may perhaps as well be noticed here.

The proceeding for a fine, for not working on the highway, &c. pursuant to the 9th section of the "act to regulate highways," (r) are to be in the form prescribed by the section itself, and not under the twenty-five dollar act. (s) And formerly no notice to the delinquent was necessary, though this is now otherwise by statute.

In trespass concerning land, or indeed in any action where

(i) I. N. R. L. 396, s. 16.

(j) I. John. cas. 20.

(k) 9 John. 366.

(l) id.

(m) I. John. cas. 333. id. 25. 12 John. 435.

(n) 15 John. 493. id. 157. per Van-

ness, J. 2 Caines, 108. 17 John. 145.

(o) 2 Caines, 108. 15 John. 493.

vid. also 12 John. 257.

(p) 15 John. 157.

(q) 3 Caines, 129.

(r) 2 N. R. L. 272,

(s) 3 John. 474.

the title to land or other real estate may by possibility come in question, the jurisdiction of the justice is conditional, and depends, in the first place, on the defendant's interposing a plea of title, in the manner, we shall hereafter have occasion to notice; or in the second place, on the question of title actually arising in the course of the trial. In the first case, the plaintiff's duty is rendered plain by the act,<sup>(1)</sup> the forms of proceeding under which will be given in their proper place, in the course of the work. In the second he is to wait till the question actually arises in the course of the trial, and then to dismiss the cause without rendering any judgment. "For instance, if John brings an action of trespass against William for fishing in his fishery: (which is real estate) here the action at first is regular; for perhaps William will not deny John's title to the fishery, but only the fact of fishing, or perhaps dispute the value of the fish, which are matters the justice can try. But if William appears and denies the place to be John's fishery, and further claims a right to it himself, or under some other person, and pleads title, and enters into recognizance pursuant to the act, the justice can proceed no further, although he well knows that it is John's property, and that William is a trespasser; but he must receive the plea and dismiss the parties. And so likewise in other cases of trespass, for entering land, cutting wood, carrying away hay, &c. If the defendant claims the premises as his own, or another's by whose permission he entered, the justice must not proceed; and it is to be observed that where title is claimed as aforesaid, by the defendant, it is no matter which party has the actual possession.

But title may come in question in other actions besides *trespass for entering on lands*; as where John brings an action of trespass against William for taking and detaining his horse, and William pleads (as he may do) that he took the horse trespassing on his own land, and impounded him: in this case if John admits the horse was on William's land, but denies that he was trespassing when he took him, having been put there by William's consent; or got there through the fence of William by reason of its badness, the justice may try this issue, for the title is not in question: but if John should answer to William's plea, that the land on which he took the horse was not William's, and therefore he was a trespasser in so doing, this allegation brings William's title to the land in question; and the justice must dismiss the parties; and in this case it is seen that the plaintiff defeats his own action. So title may come in question in an action of debt or *assumpsit*; as where A had paid to B twenty-five dollars for a supposed trespass done to B, by cutting his timber; and afterwards A discovered (as he thought)

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(1) I. N. R. L. 390. s. 7.



that B had really no right to the land, on which A had cut the timber ; and upon this supposition brought an action of debt or *assumpsit* against B, as for money had and received, to recover back the \$25 ; and the justice being of opinion that the land was not B's gave judgment in favour of A for \$25. On *certiorari*, the Supreme Court of New-Jersey reversed this judgment, notwithstanding B did not plead title before the justice ; for they said A could not support his action without *disproving* B's title, and it was indifferent how the title came in question ; for the act of assembly was express, that he should not hold plea of *any* action in which the title to land should, in *any manner of ways*, come in question.

Nor can a justice try title, although the parties voluntarily join issue upon it, and a jury give their verdict, upon which he enters judgment. For where an action of *trespass on the case* was brought by A against B, for a nuisance, in overflowing part of A's meadow, by raising a mill dam. B did not deny the land was drowned, but his defence to the jury was that the land drowned was his own meadow, and not A's, however judgment going against B, he brought a *certiorari*, and the court reversed the judgment, holding that the justice and jury could not try a question of title, even with the consent of the parties.

Under this head, if the mere *possession* of land is the only question between the parties, it may be tried. As if in the case of the fishery first mentioned ; John the plaintiff, claimed no title, but founded his action upon a priority of possession, and William, instead of claiming title, merely denied John's prior possession. This the justice may safely try ; and so in similar cases.(u)"

Another case may be added to those above supposed by Mr. Griffeth, which would go still farther to illustrate his doctrine. In an action of trover for boards, the defendant offers to shew under a plea of not guilty, (as he has a right to do) that the logs out of which the boards were sawed, were wrongfully cut upon his land by the plaintiff, who drew them to his mill, and sawed them into boards, from whence the defendant took and carried them away, claiming them as his own. This would bring the title in question, and oust the justice of his jurisdiction.

In these cases I conceive it to be the duty of the justice to wait until he sees by the proof that there is a real question of title lawfully and necessarily before him ; and then to dismiss the cause ; not depending for this purpose on the mere unadmitted statement of one of the parties ; but upon proof or ad-

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(u) Griffeth's treatise 18, 19 and 20.

missions made in the course of the hearing, or upon the actual state of the pleadings. But a plea that the defendant entered into his own close : adjoining the close of the plaintiff, and there committed the trespass, would not of itself oust the justice of his jurisdiction ; though I should imagine it would be otherwise, if the plaintiff claim title to the close set up in the plea of the defendant, and deny that it was the close of the defendant. (v)

It may also be proper to notice here, what will be considered for another purpose, more at large under a subsequent head, that where words of slander are spoken to a magistrate, in respect to his official trust, he has immediate jurisdiction of the offence, whether spoken while in the execution of his office, or when he is out of court. If spoken to him while in the execution of his office, he may commit the offender : when spoken to him out of court, he may require surety of the peace, and for good behaviour, and in default of its being furnished, he may commit the offender : but in this last case the surety should be immediately required, on the slanderous words being uttered, unless the offender leave the justice before he has time to require it. He may then issue a warrant to compel the giving of surety, and commit in default thereof. (w)

The form of the commitment in the first case may be as follows : Columbia, to wit,—To any Constable of the said county. Greeting : Whereas Sylvanus Richmond, of the city of Hudson, in said county, on the fifth day of July instant, at the office of H. Dayton, Esq. (then being one of the justices of the peace, in and for the said county of Columbia) in the said city of Hudson, the said justice being present holding a court for the trial of certain cause in which the said Richmond was defendant, on the said justice pronouncing judgment against him the said Richmond, did say, that he the said justice in giving the said judgment had acted like a damned old rascal, together with many other words reflecting highly upon the said Dayton in his official and judicial character ; of which the said justice did then and there convict him, the said Richmond, and sentenced him to be imprisoned therefor, in the common gaol, of the said county, for the term of three days. These are, therefore, in the name of the people of the state of New-York, to command you forthwith to apprehend him the said Sylvanus Richmond, and to deliver him to the custody of the goaler, in and for the said county, and the said goaler is hereby commanded to receive him into his said custody, and him there safely keep in close confinement for the space of three days aforesaid. Given un-

(v) 2 Mass. T. R. 174.

(w) 10 John. 392.

der the hand and seal of the said justice, at the said city of Hudson, the 5th day of July, A. D. 1819.

H. DAYTON, justice. (L. S.)

In the second case, the Supreme Court have approved the following as a correct form : (x) " Columbia, towit, to any constable, &c. Whereas Sylvanus Richmond, of the city of Hudson, &c. on the 5th July, at the office of H. Dayton, Esq. at, &c. the said justice being present, made inquiry of the said justice, of and concerning a certain suit, which had been tried on the forenoon of the said day, in which the said Richmond was defendant ; and on being informed by the said Dayton, the justice who tried the said cause, that a judgment was given against him the said Richmond, for fifty cents, did, in a manner the most indecent, unmannerly, and without the least provocation given by the said Dayton, the said justice who tried the said cause, say, that he, the said Dayton, in giving said judgment, had behaved, and had treated him like a damned old rascal, together with many other words reflecting highly upon the said Dayton, in his official and judicial character ; in so doing he the said Richmond treated in a most contemptuous manner, the authority of the good people of the state of New-York, and their dignity ; and whereas the said Richmond was then and there required by the said H. Dayton, forthwith to find security for the peace and the good behaviour of the said Richmond, which he refused ; These are, therefore, in the name of the people, &c. to command you forthwith to apprehend him the said Sylvanus Richmond, and to bring him before me, the said H. Dayton, to find sufficient security for his personal appearance, at the next General Sessions of the Peace, to be holden in and for the said county, and also for his keeping the peace and good behaviour, in the mean time, towards the good people of the said state, and in a special manner towards the said H. Dayton, the aforesaid justice. Given, &c."

If he depart so soon, that surety of the peace, &c. cannot be required of him, recite the fact in the warrant accordingly.

In either case, on his being brought before the justice, and refusing or neglecting to find the sureties required, a *mittimus* may be issued, reciting the offence, the command contained in the above warrant, and the neglect to find sureties, thus : Columbia county, towit, to any constable, and to the keeper of the common gaol of the said county, greeting : Whereas Sylvanus Richmond, &c. [reciting the offence as in the above warrant] and whereas the said Richmond by virtue of a warrant, duly issued and returned, has been this day brought before me, the

said justice, and required by me to find security to appear at the next General Sessions of the Peace of the said county of Columbia ; and for keeping the peace and his good behaviour, in the mean time, towards the good people of the state of New-York, and in a special manner towards the said H. Dayton, with which requisition he has altogether neglected to comply : these are, therefore, in the name of the people of the state of New-York, to command you, the said constable, to deliver the said Richmond to the said keeper of the said gaol, who is commanded to receive him into his custody, and him there safely keep, until the said next General Sessions of the Peace ; or until he shall find security, as aforesaid, or, until duly discharged according to law. Given, &c.



## CHAPTER II.

### OF THE NATURE OF ACTIONS COGNIZABLE BEFORE THIS COURT.



#### SECTION I.

#### OF THE ACTION OF DEBT.

This action should never be brought, except in cases where no other action will lie. A greater degree of nicety is necessary in prosecuting it, than in *covenant* or *assumpsit*, which lie in a great variety of cases upon contract where *debt* may also be brought ; as upon a sealed agreement to pay a certain sum of money, for use and occupation, goods sold, money lent, money paid for another, or money had and received for the plaintiff's use ; or indeed upon any promise, express or implied, to pay a certain sum of money, where the immediate contracting parties are also the parties to the suit. (y) I shall, for this reason, in treating of debt, confine myself to those cases only, where debt is the sole remedy ; and these, I think, may be reduced to the following :—1. Debt on a *penal* or *single* bond. 2. On judgments in Courts of Record, and (by a late determination) a judgment in a Justice's Court. (z) 3. For various penalties imposed by statute, in which I include actions of debt for an escape, and the negligent non-execution of final process in a Justice's Court.

1. An obligation or bond is a deed, whereby the obligor obliges himself, his heirs, executors and administrators, to pay a certain sum of money to another, at a day appointed. If this be all, the bond is called a *single* one ; but there is generally a *condition* added, that if the obligor does some particular act, the obligation shall be void, or else remain of force. In case this condition is not performed, the bond is said to be forfeited, and an action of debt may be sustained upon it. (a) The party executing the bond is called the obligor ; the other party, the obligee.

Very few bonds come within the jurisdiction of a justice, as the penalty generally exceeds fifty dollars ; and the judgment

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(y) Vid. Esp. dig. N. York Ed. (z) 16 John. 233.  
part 2. p. 1, 2 & 3. (a) 2 Blac. com.

must be rendered for this, tho' execution can issue for no more than the money or damages due and assessed for a breach of the condition. If the penalty exceed fifty dollars, be the amount of the condition never so small, the justice cannot take cognizance of an action upon such a bond.(b)

Bonds are generally conditioned for the payment of money, or the condition may be to do any other lawful act, as a bond to the sheriff, that a prisoner shall not escape from the gaol liberties, which bond is by statute made assignable to the party at whose suit the prisoner is committed, in which case, provided there be a breach, such person may maintain an action in his own name.(c) or the condition may be to convey or deliver real or personal property, to perform covenants in a deed, to indemnify against certain acts, suits or events, or that a third person shall do some lawful act, &c. And a bond given, on taking out an attachment in a Justice's Court, may frequently become the subject of an action there.

2. Debt is the only proper action on a decree or judgment for the recovery of money rendered by one of our domestick tribunals, but on a judgment rendered by a court of another state or country, either debt or *assumpsit* will lie.(d) Thus, debt is the only proper action on a decree of the Court of Chancery for the payment of money, a judgment of the Supreme Court, Court of Common Pleas, or Justice's Court.(e)

3. The most usual actions brought in this court, for a penalty given by statute, are, actions for selling spiritous liquors without licence, and other penalties, arising under the act to regulate inns and taverns;(f) actions for various penalties under the act to regulate highways;(g) for money or other thing won at playing any game of chance;(h) and a great variety of other penalties for divers offences, scattered through our statute book, the rules of prosecuting for which are nearly the same in all cases. An action of debt prosecuted in the ordinary way before a justice, is also the only proper mode of recovering the penalty for obstructing or encroaching upon roads.(i) And it is proper also to remark, in regard to these actions, that the husband is in general liable for a penalty incurred by the wife; as for selling spiritous liquor without licence; winning money at play, and so of other cases.(j) This is also the proper action against a sheriff or constable for suffering a prisoner to escape from execution, or against a constable for neglecting to levy on

(b) 15 John. 474.

(c) 1 N. R. L. 429, 30.

(d) 5 John. 132.

(e) 16 John. 233. 1 Hayw. 18.

(f) 1 N. R. L. 178 & 176.

(g) 2 id. 270.

(h) id. 152.

(i) 3 Caines, 259. 1 John. 510.

(j) 10 John. 247.

property, or take the body on an execution from a Justice's Court.(k) These actions, when a part of the penalty goes to the informer, and a part to the overseers of the poor, commissioners of highways, or some person or persons other than the prosecutor, are called *qui tam* actions; when any one of the people is allowed to prosecute and recover the whole penalty to his sole use, they are called popular actions.(l) Other actions given by statute, as for escapes, lie only at the suit of the party grieved. These escapes are either *voluntary*, as where they are permitted by the officer, or *negligent*, being without his consent. In the former case, the officer cannot retake the prisoner, nor is his case bettered by retaking him, or a voluntary return, and continuance in custody by the prisoner before suit brought for the escape ;(m) but, in case of a negligent escape, recaption or voluntary return before suit brought, may be pleaded as a defence to the action. In an action to recover money lost upon a horse race, under the act (1. N. R. L. 223) the sum actually won by the defendant can alone be recovered, and though the whole be staked in his name, yet, if he in fact was the proprietor of only a part of the bet, and won only a proportion, his aliquot part alone is to be refunded.(n) A licence to keep an inn or tavern is a personal trust, and cannot be assigned so as to protect any one except the very person to whom granted.(o) Under the turnpike act (1 N. R. L. 234) the toll gatherer is not liable to five dollars penalty, for demanding toll of one exempt from its payment, but only when he demands more than is due, or hinders and delays travellers and passengers bound to pay toll.(p) And where a turnpike act forbids a person, after having travelled upon it, to turn off with his team, cattle, &c. in order to pass the gate or gates on ground adjacent thereto, and again enter on the road, with intention to defraud the company, by avoiding the payment of toll, and inflicts a penalty, it is no excuse that he turned off and travelled an old road, and the only question is, whether he turned off in good faith ; and though he turn off more than half a mile from the gate, yet it is turning off on ground adjacent to the gate, within the meaning of the act.(q)

(k) 13 John. 191.

(l) 3 Blac. com. 161.

(m) 2 Wils. 294.

(n) 17 John. 192.

(o) 14 John. 231.

(p) 16 John. 73.

(q) 18 John. 56.

## SECTION II.

## OF THE ACTION OF DETINUE.

*Detinue* is perhaps altogether superseded by the action of trover. I never knew nor heard of this action in a Justice's Court ; and, which proves its rarity, professor Wooddeson mentions it as an extraordinary circumstance, that an action of detinue was brought in the 8th year of Geo. III. in the court of King's Bench in England. Where the plaintiff is wrongfully kept out of the possession of some favourite article of personal property, as a curious piece of antiquity, furniture, a picture or the like, he might think this action preferable to trover, because herein he recovers the specifick chattel *itself*, which he sues for. And this action may arise from contract, as if I have delivered some chattel to another, which he wrongfully detains ; or the accidental possession and wrongful detention of goods. It is necessary that the thing detained be capable of being evidenced, traced and identified. Thus, money, except in a bag or chest, cannot be recovered in this action. But yet, it is not absolutely certain, that the thing itself will be recovered, though judgment be given for the plaintiff : for instance, not where there has been a valid sale. The judgment, therefore, always is for the recovery of the specifick chattel, or its value ; and to this end, the justice or jury, which ever tries the cause, should always find the *value* as well as the issue joined between the parties. But another reason has tended still farther to supersede this action. It is the more efficient remedy, by bill and injunction in a Court of Equity, to prevent the defacing, sale or destruction of those chattels, which would alone induce a party to bring this suit ; as the favourite chattels before mentioned, or the charters and title deeds of an estate. The action brought in the 8th Geo. III, was for the recovery of an indenture of lease, being the proper specifick remedy at common law.(r)

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(r) Vid. 3 Wood, lectures, 104. 5, 6.



## SECTION III.

## OF THE ACTION OF COVENANT.

Covenant lies in all cases for the recovery of damages, for breach of an agreement under seal, to do or not to do a particular thing, as to pay a sum of money, repair a house, and the like ; and the bare putting a seal to a promissory note, actually changes the nature of the contract, and makes that a covenant which would otherwise have been a simple contract or promise. No consideration need be expressed, for the seal is said to import a consideration. Any words amounting to an agreement or engagement to do or not to do, &c. will constitute a covenant, as if in a lease it is said, that "the lessee shall repair;" this is a covenant to repair, and so with any words of like import. (s)

This action is the usual and proper one in all the following cases, as well as in a great variety of others : 1. On a sealed note ; 2. On an agreement, under seal, to pay a particular sum of money, either absolutely, or on certain conditions being performed by the party to whom payment is to be made ; 3. On a sealed lease for rent certain, where there is an express covenant to pay; and the words *yielding* and *paying*, usual in a lease, are held to import a covenant ;(t) 4. On a covenant for quiet enjoyment of premises, leased or sold ; 5. On a covenant to save harmless or keep indemnified ; 6. On a covenant to make a title, or farther assurance of title ; 7. On a covenant to pay taxes ; 8. On a covenant not to plough meadows, commit waste, and other usual covenants in leases ; 9. On an agreement under seal to do work, deliver a horse, &c. ; 10. Against a constable and his sureties, or one of them, on an agreement under the statute, to pay money, which such constable shall become liable for, on account of any execution, &c.(u) It is not necessary that both parties should execute the agreement ; it is enough that this be done by the party to be charged,(v) and if an indenture of apprenticeship state, that the son is bound with the consent of the father, and the father sign the indenture and seal it, he is accountable for a breach of the covenants, even though he is not named therein.(w)

Mutual covenants are divided into those which are dependent, and those which are independent. Wherever the money is to

(s) Vid. Esp. dig. N. York ed. pt. ii. 115.

(t) id.

(u) 2 N. R. L. 126.

(v) Cro. Eliz. 212.

(w) 10 John. 99.

be paid, and the act done at the same day, the covenants are dependent, and neither party can sue without averring performance, or offer of performance, on his part ;(x) and so, if John covenants with James to split 5000 rails, and James covenants that, *on the said work being completed*, he will pay John 50 dollars, James' covenant is *dependent*, and the performance of the work by John is called a *condition precedent*, which, in an action for the fifty dollars he must aver and prove performed, or at least an offer to perform. and that he was prevented a performance by some act or neglect of James. But if James had agreed to pay John the fifty dollars on the 10th of September, and John had agreed to have the 5000 rails split on the 20th of September, the covenants are independent, and John can recover the 50 dollars although he had not touched the work, and James must bring his cross action for a breach of John's covenant: and it was once holden by the Supreme Court, that an agreement by James to pay any part of the purchase money before the work was done, as if, in the last case, he had agreed to pay 25 dollars on the 10th of September, and the residue on or after the 20th, rendered the covenants independent throughout, and gave John the same right to recover both instalments without touching the work, as he would have, if the whole was to be paid before the work done ;(y) but this doctrine is now exploded, and the covenant of James is holden to be independent as to the first instalment, but dependent as to the second. And the extent of the rule, as now holden, is, " that if, by the terms of the contract, the money is to be paid by a day certain, and which is to happen before the performance of the service, or by a day certain, and there is no day certain for the performance, the performance is not a condition precedent."(z)

It may be proper here to remark, that all contracts, under seal, are called *agreements by specialty*, in order to distinguish them from *contracts unsealed*, whether written or verbal, which form the subject, of an action of *assumpsit*, one of the numerous heads or subdivisions of trespass on the case.(a)

The doctrine above advanced, as to mutual covenants, dependent and independent, will apply as well to contracts unsealed, as those which are sealed, and the doctrine on the subject of contracts in general, which I shall consider under the next head, will, in many of its parts, apply to contracts by specialty.

(x) 2 John. 207. 10 id. 203. 16 id. 267.

(z) 10 John. 264.

(y) 2 John. 272, 387.

(a) Vid. 1 Com. or Con. 1.

## SECTION IV.

## OF THE ACTION OF TRESPASS ON THE CASE.

Trespass on the Case arises 1st, from the breach of a simple contract, whether written or verbal ; and 2d, from the commission of some wrong.

1st. In the first case, it is called the action of *assumpsit*.— This is a comprehensive action, extending to most of the contracts in civil life, in all their various modifications.

All contracts, as we have seen, are distinguished into agreements by specialty, and agreements by parol ; whether they be merely written or spoken, or implied by the law, they are denominated contracts by parol. These, *alone*, are the subject matter of the action of *assumpsit*, the trial of which will frequently involve an inquiry into all the nice technical parts of a legal contract.

“ A contract is an agreement upon sufficient consideration, to do or not to do a particular thing.” And all the contracts of which I have spoken, or shall have occasion to speak, are reducible to this definition.

1st. *It is an agreement*, a mutual bargain or convention, and, therefore, there must be at least two contracting parties, of sufficient ability to make a contract ; as where James contracts with John to pay him \$50. John thereby acquires a property in the \$50, which property is not however in possession, but in action merely, and recoverable by suit at law, and is called in the law a *chose* or thing in action, as contradistinguished from a *chose* or thing in possession ; as John's horse or other chattel, to which he has not only a right by purchase, or in some other way, but a possession by the use of it.

This contract or agreement may be *express* or *implied*. *Express*, as where the terms of the agreement are openly uttered, or put in writing and signed by the parties ; as to deliver an ox, or a load of wood, or to pay a stated price for certain goods.— *Implied* are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform. As if I employ a man to work for me, the law implies a promise in me to pay him what he deserves for his labour. If I buy goods of a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value.

A contract may, also, be either *executed*, as if John agrees to

exchange horses with James, and they do it immediately, in which case, the right and the possession are transferred together ; or it may be *executory*, as if they agree to change next week. Here the *right* only vests, and their reciprocal property in each other's horse is not in possession, but in action. For a contract *executed* conveys a *chose* in possession, a contract *executory* conveys only a *chose* in action.

Again—This contract must be an agreement upon *sufficient consideration*. This is the price or motive of the contract, and is so absolutely necessary, to the forming of a contract, that what the law calls a *nudum pactum*, i. e. an agreement to pay or do any thing on one side, without any compensation on the other, is totally void in law, and a man cannot be compelled to perform it. Thus, in the case above mentioned, James's promise to John to pay him \$50, will not bind him to do so, unless it is for some thing, which John either has done at James's request, or for some thing which he promises to do for James. But any trifling consideration is sufficient to prevent the agreement from being void ; nay, even a prior moral obligation in James to pay John the \$50 will operate as a sufficient consideration ; as if the debt had been barred by the statute of limitations, or James had been discharged under the insolvent act, still, the moral obligation to pay remaining, the promise would be supported by it (b) A promise, in consideration of something already done and passed, will not be binding, unless such past consideration have been performed at the request of the party promising ; but a request may be inferred from the beneficial nature of the consideration, and indeed is proper matter of inference for the jury ; (c) and a past beneficial consideration, to which a dependant assents, will support a promise to pay ; as if I promise to pay a sheriff or constable money, which they have been obliged to pay by reason of having voluntarily suffered me to escape. (d) If you get judgment and collect it against me, for money which I have paid you, and you afterwards promise to repay it, your promise is binding, on the ground of a prior moral obligation. (e) A contract, under seal, is binding between the parties, although no consideration in fact exist, but so strictly does the law adhere to the necessity of a consideration, that, in this case, it will imply one, and estop the party from questioning it ; (f) nor can a defendant in such case show a failure of consideration, or a fraudulent one. (g)

Almost all considerations are reducible to the three following heads : 1. Where the parties mutually agree to give some

(b) 7 John. 36. 14 id. 178.

(c) 14 John. 188.

(d) id. 379.

(e) id. 468.

(f) 13 John. 430.

(g) id. & 2 John. 177 & 179.N.



thing, comprehending sales, exchanges, loans and the like ; 2. Where the parties are mutually to do or forbear some thing, as in consideration that James will lay up wall for John, he will thresh wheat for James, or in the common instance of changing works, and the like : or, in consideration that James will not keep tavern in such a place, so as to interfere with John's tavern, John will not keep his store open in the same place, so as to interfere with James' store ; 3. Where the parties mutually agree, the one to perform any work or business, and the other to give him something for it, either specifically agreed upon, or left to the determination of the law to set the value to it, as in hiring to work for a certain sum by the month ; or if the hiring be general, the law implies a contract to work for what the services are reasonably worth ; and the law will also, in such case, imply a promise in the employer, to pay the reasonable value of the service.(h)

3d. A contract is "*to do or not to do a particular thing.*" The most usual contracts in relation to chattels personal are, 1. That of sale or exchange ; 2. That of bailment ; 3. That of debt.

1. Sale or exchange, is a transmutation of property from one man to another, in consideration of some price or recompense in value. If it be a commutation of goods for goods, it is an *exchange* ; but if it be a transferring of goods for money, it is called a *sale*. But with regard to the law of *sales or exchanges*, there is no difference, and they may both be considered under the single denomination of *sales*. The seller is called the *vendor*, the buyer the *vendee*. When the vendor hath in himself the property of the goods, he hath in general liberty to dispose of them to whom ever he pleases, at any time and in any manner.

If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them ; for it is no sale without payment, unless the contrary be expressly agreed. And therefore, if the vendor says the price of a beast is \$50, and the vendee says he will give it, the bargain is struck, and neither of them are at liberty to be off, provided immediate possession be tendered by the other side ; but if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases. But if any part of the price is paid down, if it be but a cent, or any portion of the goods be delivered by way of earnest, the property of the goods is absolutely bound by it ; and the vendee may recover the goods by action, as well as the vendor the price

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(h) Vid. 2 Blac. com. 442, 3, 4, 5.

of them. But if any act remains to be done by the vendor, about the goods, as if he is to measure or weigh them, or deliver them at another day or place, until this be done, the property does not pass, so that the vendee can maintain trover for them.<sup>(i)</sup>

As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he tenders the price agreed on; but if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them; and by a regular sale, even without delivery, the property is so absolutely vested in the vendee, that if it afterwards dies, or is destroyed in the vendor's custody without his fault, still he is entitled to the price, because, by the contract, the property is in the vendee; <sup>(k)</sup> and where the vendor retains the custody of the article, after it is sold, and the property completely passed to the vendee, the vendor is considered a bailee or trustee, for the use of the vendee, and subject to the doctrine of bailment, which I shall consider in this chapter, and would be responsible for ordinary neglect, within the reason that both parties are benefited by the bailment, and contract out of which it grows.

By statute, a contract for the sale of goods, above the value of 25 dollars, is not valid, unless there be a note in writing of the bargain, or earnest paid, or some part of the goods be delivered, the note in writing to be signed by the party, to be charged with it, or his agent.<sup>(l)</sup> But this statute does not extend to a sale of goods, which requires something to be done about them, in order to get them ready for delivery, as a sale of chairs, not yet made by a chair-maker, such contracts being rather for work and labour, than for goods,<sup>(m)</sup> and it has been made a question, whether a sale of the services of a slave, for a certain time, is within the statute.<sup>(n)</sup>

The delivery required by the statute, may be either *actual* or *constructive*, and inferred from circumstances; as where the vendor, after receiving the vendee's note for the purchase money, points out the goods as the vendee's property,<sup>(o)</sup> or if the vendor give the vendee an order to a third person, with whom the goods are, for their delivery,<sup>(p)</sup> or deliver to the vendee the key of the house, wherein the goods are,<sup>(q)</sup> or the

<sup>(i)</sup> 15 John. 349. 2 Maule. & Selw. Rep. 397. 5 Taunt. Rep. 617.

<sup>(k)</sup> 2 Blac. com. 446, 7, 8. 2 John. 13.

<sup>(l)</sup> 1 N. R. L. 79.

<sup>(m)</sup> 2 H. Blac. 63. 7 T. R. 14. 10 John. 364.

<sup>(n)</sup> 11 John. 173.

<sup>(o)</sup> 2 Caines, 3

<sup>(p)</sup> 3 id. 132.

<sup>(q)</sup> 5 John. 335.

receipt of the one with whom the goods are stored ;(*r*) in any of these cases, there is a sufficient delivery to pass the goods.— A still stronger case is where a man sold his oxen to another, without any writing, earnest or delivery, and the vendee came and took them away, without saying any thing to the vendor ; this was holden to be a sufficient delivery, and the vendee chargeable for the price.(*s*) But the strongest case upon this point, I have met with, is, where a man agreed for a span of horses, but requested the vendor to keep them in his stable, but took no other delivery, and they were taken by the vendor to his stable, and left remaining there ; the property was holden to pass, and that the vendor could recover the price, without any further delivery, upon the ground that taking charge of the horses, under the agreement to keep, was a constructive delivery within the statute ;(*t*) and what circumstances amount to a delivery, is a question of fact for the jury ; as where I buy land, and ponderous articles upon it ; taking possession of the land, or other like circumstance, might be considered a delivery of those articles.(*u*)

The note or memorandum is sufficient, if it contain the names of the parties, the article sold with the price, and be duly signed, though the consideration be not stated.(*v*) Thus, the common sale note is sufficient to charge the vendor :

September 9th, 1819.

A, bought of B, one horse, - - - - \$50.  
(Signed) B.

An auctioneer, after knocking down the goods, is an agent for the buyer within the statute, and his setting down the name of the buyer, the price, &c. in writing, in presence of the vendor, is a sufficient signing ; and the broker, who is employed to sell goods for any person, and who agrees for the sale of them, and gives to the purchaser and his employer a sale note, thereby makes a sufficient memorandum within the statute, he being considered the agent for this purpose of both parties.(*w*)

Although the contract be executory, as to deliver apples or other article, at a day to come, it is within the statute, and requires a note in writing, part delivery or earnest, the same as though it be for a present delivery.(*x*) And the doctrine, that where some thing is yet to be done to, or about the goods, by the vendor, the contract is not within the statute, which we

(*r*) 5 John. 335.

(*s*) 11 John. 283.

(*t*) 1 Taunt. Rep. 458.

(*u*) 13 John. 294.

(*v*) 6 East. 307. 2 Bos. & Pull.  
238. 3 Esp. Rep. 180. S. C.

(*w*) 12 John. 102.

(*x*) 10 John. 364. 18 John. 58.

have noticed before, does not apply to the mere delivery at a future day, or other act to be performed about goods ready for delivery, but merely to goods, which are yet to be manufactured, so as to make it a dealing in regard to work and labour, instead of goods sold.(y)

2. *Bailment* is a delivery(1) of goods in *trust*, on a contract expressed or implied, that the trust shall be duly executed, and the goods re-delivered, as soon as the time or use, for which they were bailed, shall have elapsed, or be performed.

The one who delivers the goods, is called the *bailor*, the one who receives them, the *bailee*.

*Bailment* is of the five following sorts :

1. *Deposit*, is a bailment of goods, to be kept for the bailor, without recompence ; as where, on a journey, the snow leaves me, and my friend gratuitously receives my sleigh, to keep till the next snow, or winter.(2)

2. *Mandate* is the bailment of goods, to be carried from place to place, or have some act performed about them, without any reward ; as where my neighbour gratuitously takes my trunk of clothes from the tavern, in the city, to my house, in the country, or takes my horse to trim or train him to the saddle, or chaise.

3. *Lending for use*, is a *bailment* of a thing, for a certain time, to be used by the borrower, without paying for it ; as of a horse to ride, or a fowling piece to kill game.

4. *Pledging* is a *bailment* of goods by a debtor, to his creditor, to be kept till the debt be discharged.(3)

(y) 2 H. Blac. 63. 7 T. R. 14. 18 John. 58.

(1) Leaving goods in the inn yard, where a carrier sets out, is no delivery to the carrier, but a delivery to his servant, agent, &c. is good. 1. Ld. Raym. 46.

(2) In such case, which is called a naked bailment, no action will lie for the article, till a demand and refusal. 9 John. 361. 2 John. cas. 92.

(3) A pledge differs from a mortgage ; in the first, the legal property continues in the pawnor, and the pawnee has only a special property ; but on a mortgage, the legal property is in the mortgagee, and a mortgage of goods is, in some cases, valid without delivery, but not so of a pledge. 2 Caines cas. error, 200. 5 John. 258. 10 John. 471.

I deposit A's note with you, to secure a debt, which I owe you : this is a pledge, and merely authorizes you to receive the money, but not to compromise with A, for a less sum than is due, or dispose of the note, in any other manner, till my default in not paying my debt ; and where the pledge is for an indefinite period, the pawnor should be first called on to redeem. 12 John. 146.



5. *Letting to hire*, is 1. A bailment of a thing to be used by the hirer, for a compensation in money, as of a yoke of oxen to plough, at so much a day ; or 2. A letting out of work and labour to be done, or care and attention to be bestowed by the bailee, on the goods bailed, and that for a pecuniary recompence ; as a tailor may let out his work in making my coat, for a certain price, or a man may let out his care and attention in taking charge of my wheat, which I have stored with him for sale ; or a tavern keeper, in taking charge of my port-manteau, or my load of grain, which is driven into his barn, to keep through the night ; or 3. A letting out of care and pains, in carrying the things delivered, from one place to another, for a stipulated or implied reward ; as in carrying a load of wheat, or bringing a barrel of fish from market.

There are also innominate bailments, or those which are not brought under any particular name or class in the law. These are, 1. The reciprocal use or gift of some other thing, as if James bails to John his parade horse, and John, in consideration of this, bails his chaise horse to James, to use for the respective purposes to which they have been trained ; or if John gives James a pair of plated stirrups, in consideration of the use of James's parade horse, at the next review ; or, 2. Work and pains reciprocally undertaken, as in consideration, that a cloth dresser will dress my cloth, I will grind his corn at my mill ; or 3. The use or gift of another thing, in consideration of care and labour, and conversely ; as in consideration, that a weaver will manufacture my yarn into cloth, I will let him have the use of my horses to plough his fields, or will give him therefor some kind of provisions, equal in value to his labour.

The bailees, in the above several cases, are answerable to the bailor, either for 1. *Slight neglect* ; 2. *Ordinary neglect* ; or 3. *Gross neglect*, according to the nature of the bailment.

1. *Slight neglect* is the omission of that diligence, which every circumspect and thoughtful persons use, in securing their goods and chattels, called *extraordinary care*.

2. *Ordinary neglect* is the omission of that care, which every man of common prudence, and capable of governing a family, takes of his own concerns, called *ordinary care*.

3. *Gross neglect* is the want of that care, which every man of common sense, how inattentive soever, takes of his own property, and is esteemed in law, a *violation of good faith*.

1. A bailee who derives no benefit from his undertaking, is responsible only for *gross neglect*. (4)

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(4) Vid. 1 Barnwell & Alderson's Rep. 59.

2. A bailee, who alone receives benefit from the bailment, is responsible for *slight neglect*.

3. When the bailment is beneficial to both parties, the bailee must answer for *ordinary neglect*. (5)

4. But a special agreement, to be answerable for more or less, is in general valid. (6)

5. All bailees are answerable for *actual fraud*, even though the contrary be stipulated.

6. No bailee shall be charged for a loss by *inevitable accident*.

7. *Robbery*, by force, is considered irresistible ; but a loss by *private stealth*, is considered evidence of *ordinary neglect*.

8. No action lies to compel the performance of a naked contract, i. e. a contract *without consideration*.

9. A reparation may be obtained by suit, for every damage occasioned by an injury.

10. The negligence of a servant, acting by his master's express or implied order, is the negligence of the master.

And on the above definitions and rules, are bottomed the following propositions :

1. A *depository* is responsible only for *gross neglect*, or in other words, a *violation of good faith*. (7)

2. A *depository*, whose character is known to his depositor, shall not answer for mere *neglect*, if he take no better care of his own goods, and they also be spoiled or destroyed.

3. A *mandatary* to carry is responsible only for *gross neglect* or a *breach of good faith*.

(5) Vid. 3 John. 170. I hire your horse to use, in a particular manner, and use him accordingly ; if he become lame in such use, without my misconduct, no action lies. 13 John. 211.

(6) Carriers and others, may regulate their terms, and the extent of their responsibility, by their publick printed proposals, stuck up in the stage office, in a conspicuous place, or published in the proper news paper. 1 H. Blac. 298. 4 Eas. 371. 5 East. 507. 4 Esp. Rep. 177.

(7) You send me your horse to keep for the night, gratuitously. I turn him out, after dark, into my pasture, divided from my neighbour's by a fence, which he is bound to keep in repair, for want of which, your horse falls from my pasture into my neighbour's, and is killed. Though I am a mere gratuitous bailee, yet I may recover in an action on the case, the full value of the horse, against my neighbour. 1 Barnwell and Alderson's Rep. 59.

4. A *mandatary* to perform a work, is bound to use a degree of diligence adequate to the performance of it.(8)

5. A man cannot be compelled by action, to perform his promise of engaging in a *deposit*, or a *mandate*, nor can a reparation be obtained by suit, for damage occasioned by the non-performance of a promise, to become a *depository*, or a *mandatary*, because there is no consideration for the undertaking: but it is otherwise, if the *depository*, or *mandatary*, enter upon his trust, and afterwards neglect to perform it, according to its nature. The 1st is a *nonfeasance*, and the last, a *misfeasance*; and between these, the distinction lies. 5 Term. Rep. 143. 4 John 34.

6. A *borrower*, for use, is responsible for *slight neglect*.

7. A *pawnee*,(9) is answerable for *ordinary neglect*.(1)

8. The *hirer* of a thing, is answerable for *ordinary neglect*.

9. A *workman*, for hire, must answer for *ordinary neglect* of the goods bailed, and apply a degree of skill, equal to his undertaking.

10. A *letter to hire*, of his care and attention, is responsible for *ordinary neglect*.

11. A *carrier* for hire, by land or water, is answerable for *ordinary neglect*.

To these rules and propositions, there are some exceptions:

1. A man who *spontaneously* and *officiously* engages to keep, or to carry the goods of another, though without reward, must answer for *slight neglect*.

(8) I take your slave on trial, with a view to purchase him; sending him one half mile, of an errand, upon which he runs away, is not such a neglect as renders me accountable for his loss. 3 John. 170.

(9) A pawnee, on the debt becoming due, may call upon the pawnor, by notice to redeem, and unless he do so, in a reasonable time, may sell the goods pledged, and pay his debt out of them. 2 John. ch. cas. 62. 12 John. 146.

(1) I have goods in pawn, for a debt of A. The constable, or sheriff, takes these goods, and sells them on an execution against A. I may recover the full value of these goods, in an action against the officer, upon the general principle, that he, who has a special property in chattels, being answerable to the general owner, unless he takes good care of them, may recover the whole in damages against a wrong doer, who takes them away 5 Binney, 457.

2. If a man, through *strong persuasion*, and with *reluctance*, undertake the execution of a *mandate*, no more can be required of him, than a fair exertion of his ability.

3. All bailees, become responsible for losses by casualty or violence, after their *refusal to return* things bailed, on a lawful demand.

4. A borrower and a hirer are answerable, in all events, if they keep the things borrowed, or hired, after the stipulated time, or use them differently from their agreement.

5. A *depository*, and a *pawnee*, are answerable in all events, if they use the things deposited, or pawned.

6. An inn-keeper, is chargeable for the goods of his guest, within his inn, if the guest be robbed by the servants, or inmates of the keeper, or if they be stolen by any other person, although the goods be not delivered into his special keeping, and no negligence be proved; as where a sleigh load of wheat was put by a guest, into an out-house, appurtenant to the inn, where loads of that description were usually received, and the grain was stolen. 5 Term. Rep. 273. 14 John. 175.

7. A *common carrier*,<sup>(2)</sup> by land, or water, must indemnify the owner of the goods carried, if he be robbed of them. And indeed, if they are lost in any other way, except by the act of God, or the publick enemies. Vid. cases cited, 2 Com. on cor. 391.

It is proper to remark, that every *bailee*, is responsible for a loss, even by *accident* or *force*, however inevitable, or irresistible, if it be occasioned by that degree of negligence, for which the nature of his contract makes him generally answerable.

All the preceding rules and propositions, may be diversified to infinity, by the circumstances of each particular case, and the inquiry for a judge and jury is, after having settled the nature of the contract of bailment, and determined for what degree of neglect the bailee is accountable, to apply these rules and propositions, to the circumstances in evidence, and in this respect, the office of a justice sitting alone, or a jury under his direction, are the same, and it is, as in a thousand other cases, a question of fact for their determination. Vid. Jones on Bailments, 117. 18, 19, 20, 21, 22.

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(2) All persons carrying goods for hire, by land or water, are deemed common carriers. Salk. 249. Bac. abr. tit. carriers. (A.)



3. The last species of contract I shall consider is that of debt, whereby a chose in action, or right to a certain sum of money, is mutually acquired and lost. This may arise from any of the other species of contracts, and any contract whereby a determinate sum of money becomes due to any person, and is not paid but remains in action merely, is a contract of debt, and taken in this light it comprehends a great variety of acquisition, being usually divided into debts of record, debts by special, and debts by simple contract. (z)

And before I proceed further upon this topic, I shall avail myself of this place to mention one important incident attending all these choses in action, which is, that they are *assignable*. The doctrine on this subject has of late grown into a regular system, in a court of law, as well as in equity, though at law, it was formerly holden that they could not be assigned except in a very few instances. I think it may at this day be laid down, that any demand arising on contract, though *uncertain* in its amount, may be assigned or sold by the creditor, who is then called the *assignor*, to another who is called the *assignee*; (3) and so transferred from hand to hand like any other chattel, though this claim must always be sued in the name of the original creditor; and after an assignment and notice thereof to the debtor, a payment to any other than the owner of the debt, under the assignment, or some one by him authorized, will be void; and so of a claim by way of set-off, or indeed any other defence, arising after such notice, without the consent of the assignee; (a) but it is otherwise of a matter of defence arising against the creditor, before assignment and notice. (b)

On a promise to pay the assignee, after assignment, he may sue in his own name; (c) and a promise by an obligor, indorsed on a bond, that he will pay the money to the assignee of the obligee, will enable such future assignee to maintain an action of

(z) 2 Blac. com. 464.

(a) 1 John. cas. 51 & 411. 2 id. 121.  
4 John. 403. 3 John. 425. 11 John.  
47. 12 id. 343.

(b) Vid. Bac. abr. tit. assignment,  
Philadelphia ed. and authorities  
there cited.

(c) 2 Blac. Rep. 1269.

(3) It is proper to mention here, once for all, that the termination *or* and *ee*, as used in law, (and they are frequently used, being important for the purposes of brevity) have, the first an *active*, and the last a *passive* signification. The *or*, is the doer, performer, or giver, and the *ee* is the one who receives the deed, performance or gift. Thus, the one who gives a mortgage, is called the *mortgagor*, the one to whom given, the *mortgagee*; the one who loans or hires out goods to be used or kept, is called the *bailor*, the one who receives them, the *bailee*; and so we come by the words *obligor* and *obligee*, in a bond, *promisor* and *promisee*, in a note, or other simple contract, *assignor* and *assignee*, in selling a chose in action, *vender* and *vendee*, in the sale of goods, and so of innumerable other instances.

*assumpsit* upon such promise ;(d) and where an assignee gave notice to a debtor and requested payment, and the debtor desired time, and requested that the assignee would not sue him, this was holden by Blackstone J. a sufficient promise to maintain an action of *assumpsit*.(e)

An order on my agent to pay you a certain sum out of debts in his hands for collection, is, though unaccepted, an assignment of so much of the debts as shall be necessary to satisfy the order ;(f) and so a delivery of a note to receive and apply on a debt, is an assignment of it.(g) and an obligation or covenant, under seal, may be assigned by writing not under seal ;(h) and, indeed, the mere delivery of a chose in action, for a valuable consideration, as a bond, covenant, note, &c. is a valid assignment.(i) An attorney, having a lien for the costs of a judgment, obtained by him against the original defendant, shall be deemed an assignee, and is entitled to the benefit of all the rules applicable to other assignees.(j)

Where I hold a note not negotiable, indorsed by the payee in blank, with a view to assign it to me, I am an assignee, and must give notice as in other cases ; and it is not sufficient notice to the maker, for me to demand the money of him, but I should produce the note and state my interest.(k) But an actual knowledge by the debtor, of any circumstances calculated to put him on inquiry, is a sufficient notice to him.(l)

Where an action is brought by another in the name of an assignor, the defendant cannot insist that some other one, than the person who brings the suit, is beneficially interested, and thus defeat the action.(m)

The assignee is protected throughout ; and where he has obtained judgment in the name of the assignor, he may still, in the name of the assignor, recover against the sheriff, for an escape of the defendant from execution, though the nominal plaintiff may have released the sheriff, if such release be after the notice of the assignment given to the sheriff ;(n) and so of an attorney, having a lien for his costs.(o) And should the assignor, after notice to the debtor, bring an action and recover judgment against him, he having notice that such suit was not for the assignee's benefit, this will not bar a subsequent action by the assignee, in the name of the same assignor.(p)

(d) id.

(e) id.

(f) 1 Caines Rep. 363 & 3 John. Rep. 71.

(g) 12 John. 346.

(h) 16 John. 51.

(i) 17 John. 234.

(j) 15 John. 405.

(k) 9 John. 64.

(l) 12 John. 343.

(m) 11 John. 488.

(n) 15 John. 405.

(o) id.

(p) 16 John. 51. 17 John. 234 S.P.

The assignee of a chose in action may set it off against a debt due from him in his own name and right, if he obtained the assignment before suit brought against him. (q)

But to return to the action of *assumpsit*. Having already considered the two classes of debts or *chooses* in action, due by record or specialty, under the head of *debt* and *covenant*, it remains for me to treat of simple contracts *only*, they alone being the subject of an action of *assumpsit*. These are such, where the contract is ascertained by mere oral evidence, or by writing unsealed, which is capable of more easy proof, and therefore *only* better than a verbal promise. (r) It is easy to see into what a vast variety of obligations this class may be branched out, through the numerous contracts for money which are not only expressed by the parties, but virtually implied by law. (s) And,

1. An action of *assumpsit* may, in a great many different ways, grow out of the various contracts I have already mentioned, as in case of a sale, where the price is not paid in ready money, the vendee becomes indebted to the vendor for the price. In bailment, if the bailee carelessly loses or detains a sum of money, bailed to him for any special purpose, he becomes indebted to the bailor for the same numerical sum. So may the bailee, to pay the hire of the thing bailed, or the bailor, to pay for the work done upon or about the thing bailed; and so thousands of instances might arise from the single contract of bailment, which I have mentioned, in which an action of *assumpsit* will lie.

The action of *assumpsit* is brought, most usually, in a justice's court, on the following grounds:

1. *On all special agreements written or parol, to do or not to do some particular thing, which agreements remain open and unexecuted between the parties.*

2. *For goods sold and delivered, or bargained and sold.*

3. *For work and labor done.*

4. *For money had and received, to the plaintiff's use.*

5. *For money paid, laid out and expended, for the defendant.*

6. *For money lent.*

7. *For use and occupation.*

(q) 8 John. 152. 2 Bay's Rep. 481.  
17 John. 330.

(r) 2 Blac. com. 465.  
(s) id.

8. *On the various contracts, in the course of a suit, in a justice's court; as against one becoming security, to enable a party to obtain an adjournment, or to procure a stay of execution thirty days, &c.*

9. *On bills of exchange and promissory notes.*

10. *On an account stated, or balance struck upon settlement.*

But before I go into a consideration of these heads, I shall advert to some rules and cases, of practical importance, relating to this action generally, and therefore, not reducible to any of the above subdivisions.

We have seen that the slightest consideration will support an *assumpsit*,<sup>(1)</sup> and the *least* benefit to the defendant, or loss to the plaintiff, is sufficient within this rule;<sup>(u)</sup> as if I promise something in consideration of the discharge of a debt, the delivery of a bond, or other security, the proof of a debt, the trial of a claim in a particular manner, the procuring the enjoyment of a house, the procuring a note from the defendant to the plaintiff; in consideration, that you will deliver me goods, in which you have only the special property, being a mere bail-ee; that you will assign to me an uncertain debt, &c. &c;<sup>(v)</sup> That if you will enter into A's land, which I claim, I will indemnify you;<sup>(w)</sup> that if you will do some act for the benefit of A, I will pay you a certain sum of money;<sup>(x)</sup> so a submission to arbitration, is a sufficient consideration for a promise to abide the award;<sup>(y)</sup> but the promises to submit, must be made at the same time, or they are void.<sup>(z)</sup>

One promise is a good consideration for another; as in case of mutual promises to marry; so, where in consideration of your promise to deliver me a cow, I promise to pay you twenty dollars, your mere promise is a good consideration for mine, though you have not performed;<sup>(a)</sup> but such promises must be made at the same time;<sup>(b)</sup> and so where you and I, each of us, present our cloth to the judges of the county, in order to obtain the premium given by the act; (sess. 31. c. 186. sec. 2.) agreeing that the one who succeeds, shall go halves with the other; these are mutual promises, and binding.<sup>(c)</sup>

Instances have already been given, where a *moral obligation* has been held a good consideration for a promise.<sup>(d)</sup> In pursuance of this rule, it has been determined, that where a note

(1) Ante 26.

(u) 1 Caines 45. 3 John. 100.

(v) Vid. cases. cited in 1 Com. on Con. 13, 14. 15.

(w) 2 John. cas. 52.

(x) 1 Caines 45.

(y) 3 Caines 166.

(z) 12 John. 397.

(a) Vid. cases cited, 1 Com. on Con. 15.

(b) Hob. 88. 1 Caines 583. 12 John. 190.

(c) 8 John. 304.

(d) Ante 26.



is given to A, for my benefit, which you purchase of A, and I afterwards promise to pay it to you, this binds me on the ground of my prior, equitable obligation ;(e) and though, if one command, or request another to commit a trespass, or other wrong, which is done, the law will not *imply* a promise of indemnity, yet an express promise to indemnify, either before or after, will bind ;(f) but whether a mere moral obligation, will of itself raise an implied *assumpsit*, without any express promise ? Quere.(g)

We have also seen that a mere gratuitous promise will not sustain an action, as in consideration of natural affection, or friendship ; so, if one buy goods for money, which is not paid, nor any earnest given, nor day set for payment, nor the goods or any part of them delivered, no action lies for the money or goods.(h) So, if I offer you goods, and give you a certain time to consider my offer, and you determine to take them within the time, and give me notice, this does not bind me, for you, not being originally bound, there is no consideration for my promise.(i) So, if a carpenter gratuitously undertake to build a house, but neglect it, no action lies, even though special damage is sustained by such neglect ;(j) though it would be otherwise, if he entered upon the work ;(k) so, no action lies upon an *assumpsit*, in consideration of relinquishing a promise, which is void,(l) or a discharge from a wrongful arrest,(m) or a lease at will.(n) And a promise that some act shall be performed by a third person, is void, unless upon a consideration ;(o) so, a promise to pay damages for the detention of a sum of money, beyond the sum detained, is void.(p) Where I promise to allow you to pass and repass, over my lands, this is a mere gratuitous licence, and I may, notwithstanding, shut up the fence.(q) Paying a part of a debt, is no consideration for forbearing to sue.(r) But where I have a judgment against you, and you deliver me a chattel, as a security for it, and I afterwards sell the chattel, under an execution upon the judgment, promising to pay you what it fetches at the sale, beyond satisfying the judgment, I am bound by such a promise.(s)

We have also seen,(t) that a past or executed consideration will not be good, unless performed at the express or implied re-

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| (e) 2 Caines 150.                  | (b) 1 Roll. abr. 26. l. 10. |
| (f) 1 Campl. Rep. 345. per. Ld.    | (m) Yelv. 25, 6.            |
| Ellenborough, C. J.                | (n) 1 Roll. abr. 23. l. 37. |
| (g) 13 John. 380.                  | (o) 4 John. 280.            |
| (h) Dyer 30. a. Shep. Touch. 224.  | (p) 2 John. 442.            |
| (i) 3 T. R. 653. 7 John. 470.      | (q) 10 John. 246.           |
| (j) 2 Ld. Raymn. 919. 5 T. R. 143, | (r) 12 John. 426.           |
| 9. 4 John. 84                      | (s) 11 John. 533.           |
| (k) 2. John cas. 92.               | (t) Anta 26.                |

quest of the party promising ; for I shall not be permitted to do you a kindness, and then charge you with it, even though you promise to pay for it. As if I voluntarily, and without your knowledge, procure bail for your servant, who is arrested, and you afterwards promise to pay me for my trouble, this shall not bind you ;(u) but it would be otherwise, if I had done this at your request.(v) And where the consideration is actually beneficial to the defendant, the law will sometimes imply a request ; as if I pay your debt, or buy goods for you, and you agree to the payment, or receive the goods, or if the plaintiff bury the son, or wife of the defendant, who die in his absence, in these instances, the law will imply a request.(w) And in this, and other instances, of like beneficial considerations, some of which we have before noticed, though altogether past, the jury may infer a request in order to support the promise.(x) And a consideration executed in part, and continuing at the time of the promise, and completed afterwards, will always support a promise, though it be begun and completed, without the request of the party promising.(y) But the consideration, in order to support a promise, must always be such as the promisee has it in his power to perform.(z)

You owe me grain, which you deliver to A, and he promises to deliver it to me, which he neglects to do ; in this case, I may sue A, upon this promise, though the consideration moved from me, and the promise was made to you, because the promise was for my benefit.(a) And assumpsit lies against the stockholder of a turnpike company, for the shares he has subscribed, notwithstanding, another remedy may be given by the act.(b) It lies on a foreign judgment ;(c) and so, by the plaintiff against a sheriff or constable, for the amount of goods sold on execution by him, though the vendee refuse to pay for them.(d) So, where on a covenant to pay money, part has been paid, assumpsit will lie on an implied promise to pay the residue ;(e) so, it will lie against a sheriff, upon a rule to pay over money on an execution ;(f) against a party who has promised to pay the costs taxed against him on a motion, or for opposing a motion ;(g) and where two agree to bear their equal expense of a survey of land, and one pays the whole, he may recover an equal share of the other.(h)

(u) Dyer 272. a. 7 John. 87. 1  
Caines 583.

(v) Vid. the cases cited 1 Com. on  
Con. 20 to 24, & 10 John. 243.

(w) Vid. cases cited Com. on Con.  
23, & 14 John. 138. 10 John. 243. 1  
Caines 583.

(x) 14 John. 183.

(y) Vid. cas. cited 1 Com. on Con.  
24 & 5.

(z) id. 28, 29.

(a) id. 27, 8, & 1 John. 139.

(b) 9 John. 217. 1 Caines 381. 1  
Caines cas. error 86. S. C. 14 John.  
238.

(c) 5 John. 132.

(d) 9 John. 96.

(e) 12 John. 227.

(f) 13 John. 255.

(g) 15 John. 233.

(h) id. 238.

*Assumpsit* will not lie, upon a bet on the election of governor, made between two governor voters, for this is contrary to public policy ;(*l*) though it will lie on a wager upon shooting at a mark, or other wager not prohibited by statute, and where there is nothing involved in its determination, contrary to public policy, morals or decency ;(*m*) nor will it lie by an officer, on a promise to pay him the debt, if he will release a man from execution ;(*n*) and no valid contract of any kind can exist, or be made, between a citizen of one belligerent nation and another, because such contract is illegal.(*o*) On a contract to pay money, by instalments, or do any other act at different times, an action lies for each and every default, though the contract be a single and entire one.(Vid. 2 Com. on con. 568 to 572.)

Where my *servant* has authority to buy and sell goods for me, I am answerable for his acts, and where he usually buys upon credit, I am accountable, though he buy without my express orders ; and so where I give him money every Saturday, to defray the charges of the foregoing week, and he converts the money to his own use, I am liable ; and sending my servant to you to deal on credit once, would make me liable, though he should deal with you a second time, contrary to my orders ; and I am liable for the goods or services, procured by my servant, which come to my use or benefit, even where he has agreed with me for a certain compensation, to procure them on his *own* responsibility, unless the person with whom he deals, has notice of such agreement ; and so where your servant brings me various articles on credit, which I pay you for, and he afterwards continues to bring as usual ; but I pay him the money, telling him I will deal no more on credit, and he converts the money ; no notice being given to you of this new arrangement with your servant, you may recover for the articles thus paid for ; but the rule is otherwise where my servant is furnished with ready money, upon an understanding with you, that we are to deal in ready money. Here, if you credit my servant, you must loose it. But even in this case, I must keep my servant in cash beforehand, otherwise I am liable for goods which come to my use and benefit, with my assent, even though I know nothing of the contract at the time, and this, though it is the only contract my servant ever made for me. But if I forbid you to trust my servant, without ready cash, and you violate such direction, it is at your peril, for I am not then liable.(*p*)

(*l*) 12 John. 376.

(*m*) 10 John. 406, & vid. 2 Com. on con. 486 to 507.

(*n*) 13 John. 366.

(*o*) 16 John. 438.

(*p*) Vid. cases cited in 1 Com. on con. 218 to 225.

The master is entitled to the wages or earnings of his apprentice, and may bring an action against whoever employs him, and whatever he earns shall go to the master, who may maintain an action of trover for it, if it be a specific chattel, and pass into another's hands; as where the apprentice had earned two lottery tickets, which a third person withheld; and all this, whether the employer know he is an apprentice or not.<sup>(q)</sup> But it is otherwise; in respect to an hired servant, for here, he should have notice; and the action in such case is not so properly for the wages, as for the damages, arising from his being enticed away from his master's business.<sup>(r)</sup> But the services of a child, under age, are on the same footing in this respect as those of an apprentice, unless he work out with his father's permission, or through his neglect to maintain him.<sup>(s)</sup> And where one employs the slave of another, the law implies a promise to pay the owner for the services of the slave, though he be employed without the owner's consent.<sup>(12 John. 188.)</sup>

Questions frequently arise in this action, out of the relation between principal, factor and agent; and though the factor be principally concerned in foreign merchandize, or at least in some extensive trading concern at home, and so his acts can rarely be drawn in question by the limited jurisdiction of which we are treating; yet we shall briefly consider some points concerning him, inasmuch as they illustrate the doctrine applicable to principal and agent, which is a very extensive, as well as very useful relation, in common life.

A factor in commerce, is an agent or broker, employed by merchants to buy or sell goods, or negotiate bills, or transact any kind of business on their account, and for which he is entitled to a certain commission or allowance.<sup>(t)</sup>

His general duty is to consult the interest of his principal, according to the best of his judgment, and to pay strict obedience to specific orders, unless absolute necessity forbids his compliance.<sup>(u)</sup>

A factor or agent cannot delegate his power to another, without the express authority of his principal; and he should transact all business, for and on account of his principal, both with a view to bind his principal, and prevent his own personal liability.<sup>(v)</sup>

<sup>(q)</sup> id. 224 to 227. 6 John. 274.

<sup>(r)</sup> id.

<sup>(s)</sup> Reeves domestic relations 290.

15 Mass. Rep. 274.

<sup>(t)</sup> Vid. Beawes Lex. mer. 44, 45.

<sup>(u)</sup> id. & cases cited 1 Com. on con. 236, 7. 1 John. cases, 437. n.

<sup>(v)</sup> id.



The authority of an attorney or agent must be strictly pursued, or the act is void ;(w) and where an authority is given to several, as to several agents or attorneys, or arbitrators, without saying *jointly* and *severally*, or making the act of a majority or a portion of them binding, they must all agree and join in executing such authority, or their act or award will be void, though it is otherwise of officers appointed by the public, to do certain acts. In this case, unless a part be empowered to proceed, they must all be present, but the voice of a majority is binding ; as in the case of town, county and other officers.(x) And an agreement by a mere attorney, in his own name, is void ; his deed, contract or other act, should be executed or performed in the name of his principal.(y)

A factor or agent has no power to pledge, or otherwise dispose of the goods of his principal, to secure or satisfy his own debt ; and if so pledged, they may be recovered in trover of the pledgee, though he knew not but they belonged to the pledgor.(z)—And such pledging is an act of conversion by the factor or agent, for which trover will lie against him.(a) But where he has a lien on them for commissions, or advances (as is frequently the case) they may be thus pledged to the extent of the lien, with notice of it to the creditor, and then, before the principal can have trover, he must pay the sum for which the goods are thus holden. Nor are the goods, bills or notes of the principal subject to the debts of the factor or agent, nor will they pass to his assignees under the insolvent act ; though it is otherwise of the money which he receives for the goods of his principal.(b)

My servant borrows 50 dollars, which comes to my use, and gives a note in my name for it ; I am bound, though I have not intrusted him to do such acts : but it would be otherwise, if the money did not come to my use ; and when I entrust a servant to give notes or draw bills in my name, I am bound by his acts, even after he has left my service, if he draws a bill or gives a note, in so little time after this, that the world cannot take notice of his being out of my service, or where it is kept so secret as to prevent general notice.(c) A merchant's clerk, *as such*, has no authority to sign notes for his master.(d)

(w) 2 John. 43.

(x) 6 John. 39.

(y) 6 John. 94.

(z) Vid. cases cited 1 Com. on con. 236, 7.

(a) 14 John. 123.

(b) Vid. cases cited 1 Com. on con. 237, 8, & 4 John. 103.

(c) Vid. cases cited 1 Com. on con. 239.

(d) 10 John. 114.

There is a distinction, however, between the powers of a general, and special agent. A general agent is, where I authorize a man to transact a certain branch of business, without putting him under any restrictions; as to draw and negotiate notes, to buy and sell horses, or to buy silk. In these cases he may bind me, by indorsing a note or other guaranty of payment; he may warrant a horse, or if he misrepresents him to the purchaser, or otherwise deceives him, I am bound to abide the consequence; or if his purchase of the silk is imprudent, I must notwithstanding pay for it, and so of any other act, incident to the execution of such general authority. But on the other hand, where I empower him to sell a particular note, with directions not to indorse it, nor guarantee the payment; or to sell a horse, either with or without directions, not to warrant the horse, nor deceive the purchaser, or to buy no silk but that which is raw, it constitutes what is called a special authority, and if he violates his instructions, I am not bound.<sup>(e)</sup> A power to sell, does not of itself, give power to warrant the thing sold, or bind the principal by any fraud or misrepresentation.<sup>(f)</sup>

But if a general agent act within the general scope of his authority, it is binding, and any private instructions from the principal will not affect third persons;<sup>(g)</sup> and the above distinction in favour of a special agent, does not extend to an agent or servant, who has notoriously acted for his principal or master, as his general agent, unless such special instruction be also known to the person with whom he deals.<sup>(h)</sup>

A factor, agent or commission merchant, acting under a general power, may sell on credit.<sup>(i)</sup>

Payment to a factor or agent, at the time of the sale, is a valid payment to the principal, unless such payment be forbidden to the vendee; and the factor may, at the time of the sale, agree to set off a debt of his own against the price of the goods sold.— And when a factor under a *del credere* commission, sells the goods as his own, the buyer knowing nothing of the principal, the latter may set off a debt due from the factor, against his claim for the goods.<sup>(j)</sup> And note: a factor is said to act under a *del credere* commission, when he has a general authority to sell goods, accounting for such sales to the principal, running the risk of bad debts, and receiving for such risk an extraordinary

(e) Vid. cases cited 1 Com. on con. 230 to 243, & 5 John. 58. 7 John. 390.

(f) 5 John. 58. 7 John. 390.  
(g) 15 John. 44.

(h) Vid. cases cited 1 Com. on con. 240 to 243.

(i) id. 236. 6 John. 69. 3 John. 319.

(j) Vid. cases cited 1 Com. on con. 243, 4.

commission ; so, that the moment he sells goods, he becomes a debtor to the principal for the amount of the sale, deducting the commission. *(k)*

I am your attorney to collect a debt, instead of doing which, I send it to another attorney to sue, who receives payment ; this has been holden no valid payment, upon the principle, that an authority *to sue*, is not an authority *to receive*, the money. *(l)*

I send my servant to receive money, who takes a note or bill instead of the money, to which I disagree ; I am not bound by this transaction ; but if I acquiesce, or do any thing tantamount to acquiescence, it makes it my act ; *(m)* and unless I express, my dissent in a reasonable time, my assent will be presumed ; (12 John. 300) so, if my son have a general authority to receive money, he may bind me by a receipt for it, and if he give it away, I can only recover it of the donee ; so, if A usually receive my rents, payment to him is payment to me. *(n)*

With regard to a factor, though he is in many respects looked upon as a mere agent, yet he is in fact more than an agent in others, and enjoys greater rights. He is considered a bailee of his principal, and may therefore, if he chooses, sell goods in his own name ; and, having generally a lien for his commissions and other advances, on his bringing an action, in his own name, for the price of goods sold, such lien shall not be prejudiced by any set off, which the vendee may have against the principal ; *(o)* and where I advance money on account of goods, taking an authority to sell them in order to reimburse myself, even if I sell them in the name of my principal, I may sue in my own name, provided it does no prejudice to any claim which the defendant may have against my principal ; and so, where a debt is assigned to me, with authority to compound and receive, on submitting it to arbitration for a settlement, an award, in my favour by my name, would be binding. And this doctrine proceeds upon the notion, that in these cases there is not a mere authority, but an authority coupled with an interest ; *(p)* so that it would be clearly otherwise with a mere naked agent.

An agent, acting within the scope of his authority, is not liable upon his contract, if, at the time of contracting, he disclose the name of his principal ; and there is no difference in this respect between an agent of government, and a private or any

*(k)* *id.*

*(l)* Doug. 623.

*(m)* Vid. cases cited 1 Com. on con. 244, 5.

*(n)* *id.* 246.

*(o)* 13 John. 24.

*(p)* Vid. 1 Com. on con. 247 to 249. 13 John. 24, & vid. 7 Mass. Rep. 319.

other agent ;(q) and where money is paid by mistake to the agent, for the use of the principal, and he pays it over before notice of the mistake, he is not liable, though it would be clearly otherwise, if he had notice not to pay it over, or it has not actually been paid over, though no notice has been given ; as, where the collector at the Schenectady bridge received toll unwarrantably, from a man, going to and from a saw mill on business, though no express notice was shown *not* to pay over the toll to the company, yet the action was held to lie, the money not appearing to be *actually* paid over ;(r) and so, where the agent compels the payment of money, and it is not paid expressly for the use of the principal.(s)

But an agent may make himself personally liable, by guaranteeing the execution of the contract, if he chooses. This he may do, by expressly agreeing to be liable *himself* ;(t) and besides, he is in all cases personally liable, and may be sued as principal in the bargain, if he contracts, either without authority, or exceeds the authority given him.(u)

An auctioneer, being both a bailee and an agent, besides generally being liable for duties, has such an interest in the goods, or other subject of his sale, that he may maintain an action in his own name, for the price of the article sold ;(v) but the vendee may set off a debt due him, from the principal. (7 Taunt. Rep. 243.) He is personally liable for the deposit money, (if any) where a good title cannot be made to the purchaser ; and so, in damages for not delivering the article, if he does not disclose the name of his principal.

An auctioneer may sell goods, for less than the sum directed by the owner, though, if he be directed to set them up at such a price, he must abide his instructions ; but employing a person at the auction, to bid for the owner, called *puffing*, is a fraud upon the publick, and would render the sale void.(w)

I employ an auctioneer to sell an estate, to which I have no title ; he sells it, and receives deposit money, which he is obliged to refund with costs ; his proper remedy over against me, is a *special action on the case*, and not *assumpsit*.(x)

(q) 15 John. 1.

(r) 7 John. 179.

(s) 9 John. 201, & *vid.* on this subject 1 Com. on con. 249 to 252.

(t) *Vid.* 1 Com. on. con. 252 to 259.

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(u) *id.* 3 John. cas. 70.

(v) 16 John. 1.

(w) 6 T. R. 642. Cowp. 395.

(x) *Vid.* 1 Com. on con. 254 to



As between principal and agent, in order to maintain an action against the latter, the principal must prove that he was guilty of a breach of positive orders, gross negligence or fraud ; (y) and even then, if he recognizes the acts of his agent, he cannot have his action ; (z) and an agent, having a discretion, will always be protected, if he act according to the best of his judgment. (a)

As to the agents of government, (duly appointed) they are not personally liable ; as the commander of a fort, contracting for supplies of provision, or other articles under instructions from government ; a captain, for meat or forage, supplied to his troops ; (b) but it should appear that he contracted in his official character, on account of government, and that credit was given to government by the seller. (c)

There is frequently a difficulty in settling the liability of partners. Persons are deemed partners by the law, where they go shares in the profits of any trade, whether they are publicly known as such, or not ; or, where one permits another to use his credit, and hold him out as jointly liable with himself. In such case, they are jointly liable for whatever is furnished on the partnership account, during its continuance. And where one has been publicly known as a partner, he will be liable for debts contracted under the name of the old firm, or for articles relating to the former partnership concern, even after he has withdrawn, unless public notice be given of the dissolution. The most proper way of giving this notice, is to advertise the dissolution in some newspaper, nearest the neighbourhood, where the firm principally resided and dealt. This will be sufficient and effectual, as to all persons having no previous dealings with the firm, but not as to those who have trusted them. These latter should be particularly advised of the dissolution. After a partnership is thus dissolved, and due notice therefore given, the power of one partner to bind the other, ceases entirely ; (d) and even his acknowledgment of a debt, will not bind his former co-partners, (e) though it would be sufficient to defeat the statute of limitations. (f) But during their connexion in business, the acknowledgments, or entries in the firm book, by one partner, are binding on the whole. (g)

(y) id. 261 to 268. 1 John. cas. 174. 2 Caines 310.

(z) 1 John. cas. 110. 2 id. 424. 1 Caines 526.

(a) 3 Caines 226.

(b) Vid. 1 Com. en Con. 272 to 280.

(c) 3 Caines 69.

(d) 2 John. 300.

(e) 3 John. 536. 15 John. 409.

(f) 6 John. 267.

(g) 15 John. 409.

This partnership may be general, comprehending all the usual dealings of the partners, or confined to some particular branch of trade; as discounting bills or notes, or the purchase and sale of a specifick quantity of goods, or other particular act of trade, with which the partnership begins and ends; and where the partners hold themselves out to the world, in their true characters, they are not liable beyond the real scope of their connexion; otherwise, where they represent, and hold forth their concern, as more extensive than it really is.

Partners must sue, and be sued jointly; but where there is in fact a partnership, and some are secret, and others *alone* ostensible, the action may be brought against the latter, nor can such secret partnership be pleaded in abatement. (h)

If one of several partners draws, accepts or indorses a bill or note, or enters into any other contract, not under seal, in the name of the partnership firm, or for any thing relating to the joint concern, all the partners are bound, if the person with whom the contract is made, acts in good faith; and where a partner gives the firm note, or indorsement, or enters into any other contract for his separate debt, this will also bind the firm, unless the creditor know that it was without the consent of the other members of the firm, though in some subsequent English cases, it is holden that such contract is void, except where a *bona fide* indorsee is concerned. And indeed, except in the case of a note or bill, passed to a *bona fide* holder, not privy to such contract, it is settled in this state, that if a man knowingly take a note, or enter into any other contract, with an individual partner, in the name of the firm, the individual partner being the sole debtor, such contract will not bind the firm, unless the creditor shew that the other partners were consulted, and assented to the proceeding. (i) And if a creditor thus knowingly receive partnership property, in payment of an individual debt, an action of trover, or assumpsit for goods sold, lies by another partner in the name of the firm, to recover the price of it. (j) And where the limited, special nature of the partnership is publicly known, as if it be published in the Gazette, or otherwise generally understood, and it is strictly adhered to by the partners, in all their transactions, the credi-

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(h) For the cases supporting the above remarks on partners, Vid. 1 Com. on Con. 285 to 303. & 324, to 327—as to what constitutes a partnership, Vid. 2 John. cas. 329. 10 John. 226. 1 John. 166. 9 John.

470. 16 John. 34. and as to the effect of omitting to give due notice of dissolution, Vid. 6 John. 144.

(i) 16 John. 34.

(j) id.

for must at his peril see, that his deal with the individual partner relates to the joint concern, and if it does not, the firm are not bound without their assent. *(k)* And this knowledge of the limited nature of the concern, as to third persons, may be inferred from circumstances ; *(l)* where one partner drew an inland bill of exchange on the firm for his individual debt, and accepted it in the name of the firm, such acceptance was holden void. (4 Harris & Mc. Henry, 350.)

I take a note, bill or other security, from one of the firm individually, for a joint debt, without the knowledge of the other partners ; this discharges the firm ; *(m)* though it would be otherwise, if such security is received specially, " when paid, to be placed to the firm account." *(n)*

Money lent to one partner, to defray the expenses of travelling on partnership business, is a debt of the firm ; *(o)* and where one partner receives, but misapplies money due, or otherwise paid in, on the partnership account, the firm are liable. *(p)*

One partner cannot, as such, bind another by seal ; though if the other partner be present, and assenting, or not objecting thereto, the seal shall bind him ; *(q)* and a release, under seal, *(r)* or a composition and release of a debt by deed, *(s)* made by one partner, shall bind the firm. And where I become surety with one partner, in a bond for the partnership debt, though, if I pay the bond, I cannot sue both for the money ; yet, if I give the money to my co. obligor, to take up the bond, I can sue all the partners for money lent. *(t)*

No action, except account, (of which a justice has no jurisdiction,) will lie by one partner against another, unless there be a balance struck between them, and an express promise to pay ; *(u)* and even this action of account, seems to be confined to a firm of two partners only, and in all cases of a more numerous firm, unless they have settled the balance among them,

*(k)* Vid. case cited, 1 Com. on Con. 308 to 319, also 2 Caines 246. 4 John. 251. 2 John. 300. 16 John.

34. 1 John. cas. 171.

*(l)* 4 John. 251.

*(m)* 4 Esp. Rep. 91. 5 id. 122.

*(n)* 17 John. 340.

*(o)* 1 Esp. Rep. 406.

*(p)* 1 Salk. 292. Holts. Rep. 434. S. C. Cowp. 814. 5 T. R. 601.

*(q)* 7 T. R. 203. 4 id. 313. 3 John. cas. 180. 2 Caines 254. 2 John. 213.

2 Caines cas. error 1. 9 John. 285.

*(r)* 3 John. 58. 14 id. 387.

*(s)* 17 John. 68.

*(t)* 15 John. 409.

*(u)* 2 Caines 293. 12 John. 401.

4 John. 313. 17 John. 80. 2 Day's Con. Rep. New Series, 425.

they are driven to a court of Equity to adjust the concern, as between themselves.(v)

In some particular cases, where, though partners as to third persons, no such relation exists between themselves, assumpsit will lie, but it is difficult to form a notion of this distinction, without seeing the cases at large.(w)

The existence of a partnership, and whether a note was given in a partnership transaction, is a matter of inference from the evidence.(x) But the declaration of one, cannot be given in evidence to prove another his partner.(y) nor are the declarations of all or any of the defendant's evidence to support a plea of partnership in abatement, for this would be to make a man's declarations evidence for himself.(z)

A note given by one partner, in the name of the firm, will be intended to have been made in the course of partnership dealings; and it lies with the defendants to do away this intendment, by proof on their part.(a)

General reputation, connected with other circumstances, is sufficient *prima facie*, to make out a partnership, as against the firm; and where the defendants have acknowledged the existence of partnership articles, which they refuse to produce on notice, it is reasonable to infer, that if produced, they would establish the partnership acknowledged.(b)

One partner cannot introduce another into the firm, without the consent of all concerned.(c)

It is proper to notice, in regard to contracts with town and other officers, that in England, it has been determined, that church wardens may maintain an action against their predecessors, for money received for the use of the parish, which ought to be paid over to them; and, though they be not the immediate successors, and though the validity of their election be doubtful, if they are officers *de facto*, it does not lie with the defendants to make the objection. They are to declare, as church wardens, for money had and received by the defendants to their use.(d)

(v) 2 Day's Con. Rep. New Series, 425.

(w) Vid. 4 East, 144. 1 Camp. Ren. 329. 4 Esp. Rep. 182. 10 John. 226.

(x) 1 Caines, 184.

(y) 10 John. 66. 14 id. 215.

(z) 10 John. 216.

(a) 11 John. 544.

(b) 14 John. 215.

(c) id. 318.

(d) 2 H. Blac. 559.



I mention the above case, because the same rule undoubtedly extends to town, corporation and other officers, in this country, where it is the duty of the predecessor to pay over to the successor, a balance in money, which may have been received by him officially.

Where a pauper is taken suddenly ill, and an apothecary or physician furnishes medicines, or attends him in his illness, for which the overseer of the town, having charge of the pauper, promises to pay, an action will lie upon such promise ;(e) though the law will not raise an implied assumpsit, from the overseers of the town where a pauper is settled, to the overseers of another town, for providing necessaries, medicines, &c. for the pauper.(f)

The overseers are bound to take care of casual poor ; and if any other person take care of such casual pauper, for whom the overseers of the poor are bound to provide, he has a right to recover against them the expenses incurred on such an occasion. (g) But this doctrine, as to the overseers being liable for assistance administered to a pauper, in any case, has been overruled and he is not liable without an express promise to pay, unless he employ the plaintiff to render the assistance charged for. (Vide 2 East, 205. 12 John. 352.)

I shall now proceed to consider the action of assumpsit, according to the distribution before mentioned ; and with regard to the first, that of *special agreements*, perhaps enough has been said already, so far as their constituent parts are concerned. They are called special agreements, because the terms are specified by the parties, in writing, or by parol, and may be as various as the commercial necessities and purposes of mankind. They are moreover denominated special, because in declaring for the breach of them, the general counts in assumpsit, the forms of which will be hereafter given, will not answer, but the very terms of the agreements, in substance, must be set forth in the declaration ; and the evidence must correspond *strictly*, with the statement in the declaration, or the plaintiff will be nonsuited upon the trial ; that is to say, the parties to the contract, the consideration, the promise, and the breach, must all be alledged specially and truly by the plaintiff, and he must prove by his evidence the very facts which he thus alledges.(h)

(e) Bull. N. P. 129.

(f) 2 East. 505.

(g) Esp. Rep. 91. 10 John. 249.

3 Bos. & Pull. 247, but vide 2 East, 505, *contra*.

(h) Vide Esp. Dig. N. York ed. pt. 1, 262 to 264, & cases there cited.

For instance, suppose I have commenced a suit against you before a justice, and we afterwards come to a settlement, strike a balance, and I agree to discontinue that suit ; but instead of fulfilling my agreement, I go on, in your absence, and take judgment against you, and you sue me, as you have a right to do. <sup>(i)</sup> for a breach of my engagement. In stating your cause of action against me, in your declaration, you must set forth with common certainty, that *such* a suit was depending, and that, in consideration that you had reckoned and settled with me, at my request, I had promised to discontinue that suit ; but that, disregarding my promise, I had not discontinued the suit, but proceeded to judgment therein, to your damage of so much. When we come to trial, you must prove that we settled as stated in your declaration, because if it should turn out in proof, that instead of the settlement, you gave me money, or a horse, or an ox, or other thing, as the consideration for my promise, you fail to sustain your action, (vide Cro. Eliz. 79.) 2. You must prove, that I promised to discontinue that suit ; because if we merely settled, and left it there, without my promising any thing about the suit ; or I promised to discontinue the suit, upon condition that you paid me the costs of the suit, or upon condition, that you paid the costs to the justice, or any other promise, substantially varying from the one you have set forth, your action fails ; and even if you have fulfilled the condition, upon which I promised to discontinue, your action equally fails ; for, though you have an action against me, it is upon a promise differing from the one you have set forth. You have therefore failed to set it forth in your declaration truly, and must begin again. 3. You must prove the pendency of the first suit, which suit, as to parties, justice, &c. must correspond with the description in your declaration, and if you fail, in any of these particulars, your action is gone, provided the objection as to variance be made at the time of the trial. If no objection should be made, all would be well, on *certiorari* ; because the supreme court would say, that the variance is waived. But how would it be on appeal, to the common pleas ? If the party have set forth his cause of action, defectively, or untruly, in the court below, the objection still remains, to be taken on appeal, where the parties are confined to the same state of pleadings, and the same witnesses, as in the court below ; <sup>(j)</sup> the object and design of an appeal, being, *in fact*, to obtain a new trial, upon the *same issue*, in a higher court. <sup>(k)</sup> This consideration should lead parties to a greater care, in setting forth their cause of action, and in pleading throughout, especially under the fifty dollar act, than is generally exercised. I venture to say, that in nine cases out of ten, the court of com-

<sup>(i)</sup> 2 John. 470.

<sup>(j)</sup> Laws, Sess. 41, c. 94. s. 18.

<sup>(k)</sup> 17 John. 130.

mon pleas, or supreme court, in considering of the appeals given by that act, cannot sustain the plaintiff's judgment, upon a record of his own allegations themselves, without doing violence to the most familiar rules of special pleading. [ A loose, careless habit of oral pleading, has introduced an incorrigible laxity in this court, which, it is to be feared, must, on appeal, result, either in numerous arrests of judgment, or reversals by the supreme court, or such extreme lenity of construction, as to invade or obliterate those lines of proceeding, by which alone, any thing like certainty or system, can be preserved. Having premised thus much, and, as this subject is more proper for consideration, under a future head of pleading in this court, I shall dismiss it for the present, with the remark, that where a special agreement is existing and unrescinded, you never can resort to, and recover under, the general counts. (l)

2. The action of *assumpsit* for goods sold and delivered, lies wherever goods and chattels are sold and delivered, by one man to another, either at a price agreed upon, or left to be implied by the law, at what the goods are reasonably worth ; and a sale to the wife, agent, or servant, or other person, authorized expressly, or by the law, to purchase in behalf of the defendant, is a sale to the defendant himself, and may be so stated in the declaration ; for it is a maxim in law, applicable to every act, that *whatever a man does by another, he does by himself.*

Suppose the plaintiff has bargained and sold goods to the defendant, by a valid and binding bargain, which, however, he has by law a right to retain, until the money is paid, and, therefore, he refuses to deliver them to the defendant ; or suppose he has thus bargained goods to the defendant, which he the defendant refuses to take, is the plaintiff in such case bound to content himself with an action for the damages, for a breach of the special contract ? or may he have an action for the price of the goods, still retaining them, as he has a right to do, in the first instance, or holding them ready for the defendant in the second ? Here he cannot go for goods *sold and delivered*, because, in the first instance, he has refused to deliver them, and in the last, the defendant has refused acceptance. The plaintiff should, in such cases, declare and proceed for goods *bargained and sold* ; (m) and, in this action, may recover the price, retaining the goods, in the first instance, as a pledge till he obtain satisfaction of his judgment. (n) and then holding them ready for the defendant ; or, in the second instance, where the defendant has a right to take

(l) 12 John. 274. 14 John. 326.    ner 647. Holt. Rep. 8. Peake's cas.

(m) 4 Coke 93, Glade's case. Skin-    N. P. 41.

(n) Skin. 647. Holt. Rep. 8.

them, holding them at all times ready for him : and in such case, the plaintiff having chosen this remedy, cannot sell the goods to another, except on the execution upon his judgment ; or unless the defendant should altogether fail in being able to satisfy the judgment, in which case he might perhaps sell them, on notice, the same as any other pledge.(o)

This action will also lie, for the price of land sold and conveyed, and the acknowledgment of having received a full consideration in the deed, is not conclusive, but the party may not withstanding shew, that the whole, or any part remains unpaid.(p)

If the buyer of goods depart, without tendering the money, but return the next day, and offer to pay the seller, the latter may be off. except where a future time of payment is agreed on ;(q) but not so, if the property in the goods have passed, as if they are marked, or the seal of the buyer put on them, for they then remain in the hands of the vendor, merely as a security for the price ;(r) and in this case, or where earnest is paid, if the goods remain with the vendor, and the money be not paid for them, he may request payment of the vendee, on whose default the goods may be sold again ; and the difference in price, between the first and second sale, may be recovered in damages against the vendee ;(s) and whatever is paid as earnest, or as a deposit, shall be reckoned a part of the price, unless otherwise agreed.(t)

Where you agree to buy a thing, if you like it *on view*, and, upon seeing it, if you express your approbation, the condition is fulfilled, and the bargain complete ; and if you afterwards charge your mind, you are not at liberty to be off, though it would be otherwise, if you had reserved time, till a future day, to make up your mind ; for then, no matter what you may think or say, in the mean time,(u) and where goods are delivered on trial till such a time, they may be kept till that time, though the buyer disapprove, and declare his dislike of them before.(v)

On a bidding at auction, the bidder may retract his bid, at any time before the lot is knocked down.(w) But when once

(o) *id.* & vide ante Bailment, p. 30, n. (3)—p. 33, n. (9).

(p) 4 John. 210.

(q) Dyer 30. a.

(r) Skin. 647. Holt's Rep. 8.

(s) Salk. 113. Bull. N. P. 60. 6 med. 162. Skin. 647.

(t) 1 Saund. 320.

(u) Vid. 2 Com. on-Can. 215 & cases there cited.

(v) 4 Bos. & Pull. 257.

(w) 3 T. R. 148.



knocked down, if the bidder refuse to pay, the auctioneer may recover the price, in an action for goods *bargained and sold*. And this action will in such case lie, even though the auctioneer may have sold them again, on the refusal to pay, and the whole sum bid may be recovered, notwithstanding such second sale ; but if the plaintiff, in such case, go for the whole price, instead of the difference in amount of the sales, the property in the whole goods passes to the defendant on the recovery, who may demand, and bring trover for them, against the auctioneer. (x)

We have seen, that although the bargain be complete, by earnest paid, or otherwise, yet, unless a future day of payment be agreed on, the buyer cannot take the goods, without payment of the price ; and even if the vendor send the goods, but afterwards discovers that the vendee has become insolvent, he may stop them *on their passage* ; (y) and where the whole of a raft of boards, &c. were sold, and all taken out, and piled on a dock appointed by the buyer, except a few culling pieces, the bargain being to pay for the raft on delivery, and the buyer having sold out his right to H, and gone off without paying the price, it was held that the *delivery* not being complete, the seller might stop where he was, and refuse to finish piling out the raft, even though claimed by H, a *bona fide* purchaser. (z)

Where the goods are delivered to the vendee, without payment, whether they be sold on a credit or not, and though the vendee agree to pay for them in *ready money*, yet in an action brought, the vendee may set off a debt, or claim, due to him from the vendor, against the price of the goods. (a)

Agreement to deliver 20 bushels of wheat, at \$2 per bushel, on or *before* such a day, at such a time, as may be agreeable to the seller, action lies not, till a delivery of the whole, though a part be delivered before the time. (b)

An action will not lie, till after a credit on the sale of goods has expired, (c) unless, indeed, the buyer procure the credit fraudulently, or under false pretences ; as if he grossly misrepresent his circumstances, or is about running away, or going

(x) 4 Esp. Rep. 251.

(y) Co. Bankrupt Laws, c. 8, s. 17 & cases there cited.

(z) 13 John. 434. & Vid. 2 H. Blac. 316.

(a) 1 East, 375.

(b) 5 Bos. & Pull. 61.

(c) 1 Esp. Rep. 430. 2 id. 523. 4 East, 76.

off to distant parts, or practice other gross deceit, in obtaining the credit, manifesting an intention to cheat the seller out of his goods; in such cases, the credit is void, and the price due immediately. *(d)*

Goods are sold, to be paid for, in three months, by a bill, note, or other security, at two months; this is a credit of five months, and the only remedy after the three months, for non-delivery of the security, is an action on the case, upon the special agreement. *(e)* But after the five months, action for goods sold and delivered lies; *(f)* and so, if the bill, agreed to be given is drawn, but the drawee refuses to accept, an action for goods sold, &c. lies immediately. *(g)*

A delivery of goods sold to a carrier, appointed by the vendee, is a delivery to the vendee, though the right to stop them in their passage, remains as before mentioned; *(h)* and where I give you a general letter, engaging to pay for corn, which you purchase, not exceeding so much, on such a credit, in this, and the like cases, I am liable for a sale, upon the strength of the letter. *(i)*

Contracts for the sale of contraband goods, or obscene and libellous prints, books, papers, &c. are in general void, and no action lies upon them. *(j)*

A warranty of goods, must be upon the sale, and not after; for then it is without consideration; *(k)* so, where upon a treaty for a sale, and warranty made, all is broken off, such a warranty will not extend to a subsequent sale; *(l)* though it would be otherwise, if I warrant a horse, before sale, and another buys him immediately, for such sale is upon the strength of the warranty; *(m)* and a warranty that an article is sound, and shall continue so for a year, is binding. *(n)*

Where a horse, or other article is warranted sound, an action lies upon the warranty, without first returning, or offering

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| <i>(d)</i> id.   | 186, 5 Bso. & Pull. 119.                  |
| <i>(e)</i> 4 East, 147. 3 Bos. & Pull. 582. Anthon's N. P. Rep. 60 <i>contra</i> . | <i>(i)</i> 3 Cranch Rep. 492.             |
| <i>(f)</i> 4 Bos. Pull. 330.   | <i>(j)</i> Vid. 2 Com. on Con 239 to 24   |
| <i>(g)</i> 7 T. R. 60. 6 T. R. 52. 4 East, 153.                                    | <i>(k)</i> id. 264.                       |
| <i>(h)</i> 3 Bos. & Pull. 584. Cowp. 294. 8 T. R. 330, 3 P. Williams               | <i>(l)</i> Stra. 414.                     |
|  | <i>(m)</i> 1 Roll. ab. L. 5, 1 Salk. 211. |
|  | <i>(n)</i> Roll. ab. 90 pl. 6.            |

to return such article, or giving notice of the unsoundness : and so, though the vendee sell the article to another.(o) But it is otherwise, if the agreement be, to take back the horse, &c. and repay the money, in the event of unsoundness, for then there must be a return before action brought.(p)

But where an article is warranted sound, or there is any fraud in the sale, on discovering the defect, the buyer may, at his option, return it, and sue for the money paid, in an action for money had and received, or keep it, in which case his action is alone on the warranty, or for the fraud.(q)

There is no doubt that, upon a contract to sell goods, where no credit is stipulated for, the vendor has a *lien* ; so, that after the goods be *actually* delivered to the vendee, if, upon demand then made, he refuses to pay, the property is not changed, and the vendor may lawfully take the goods as his own, because the delivery was *conditional*. (Per Platt, J. 13 John. 435.)

A second husband is not bound to maintain his wife's children, by a first husband, and if he do so, it is a good consideration for a promise, when they come of age, to repay such expense ;(r) but if he receive them into his house, and they become part of his family, he then stands in the place of their natural parent, and is liable for their maintenance and education, the same as for that of his own children ;(s) and in either of these cases, he is liable for their necessaries and education, while living in a state of separation from him ; or other state, making it necessary that they should be furnished with instruction, or articles to live upon ;(t) and so, of a bastard child, provided the parent make an express promise to pay ;(u) and it is no defence for a putative father, in an action upon such a promise, that since entering into the engagement, he has found the child not to be his.(v)

The rule as to the liability of a parent, for necessaries furnished his children, extends to the relation of a master and his indented apprentice, or servant ; but in such case, strict proof is required, that the child, for whose benefit the necessaries were furnished, was, *in fact*, bound by indenture, or other valid wri-

(o) 1 H. Blac. 17.

(p) 2 H. Blac. 573. 3 Esp. Rep.

271. (q) 3 Esp. Rep. 82.

(r) 4 East. 76.

(s) 3 Esp. Rep. 1.

(t) *id.* 1, & 252.

(u) 2 Show. 134.

(v) Peake's N. P. cas. 29.

ting, and this must be proved by producing the indenture, or other writing, or giving notice to produce it, and in default of this being done, establishing the contents by inferior testimony. (x)

Where a committee of a club, party or society, contract for necessities or accommodations, in behalf of their principals, they are personally liable, and their host is not bound to look to any other members. (x)

Where goods are sold to be paid for in labour, which the vendee has offered to perform, or not been in default, an action will not lie for them. (y)

I sell you goods for a note, you knowing the maker to be insolvent, or in doubtful circumstances, but fraudulently conceal this fact, and I receive the note to be collected at my own risque : I cannot maintain an action for goods sold and delivered, but must bring trover, or an action for the deceit. (z)

The overseers of the poor, cannot maintain an action against a pauper, for necessities furnished him in any case. (a)

A man falsely represents another to be of ability to pay, upon which I trust him with goods : in such case my remedy is an action on the case for the deceit, and not for goods sold ; (b) but where goods were furnished to a man upon a fraudulent representation of his father, that he was about relinquishing business in favour of his son, even though the credit be given to the son, the father, dealing with the proceeds, was holden liable in an action for goods sold and delivered. (c)

I order a certain quantity of goods to be sent me on a certain credit, but the tradesman sends me a less quantity on a shorter credit, unless I receive and accept the goods, I am not liable to pay for them ; nor am I liable should they be lost by the way. (d)

Before an action will lie for the price of goods sold, they should be offered to the purchaser, and so on a sale of the services of a slave, for a given time, at a certain price, an offer of

(w) 3 Esp. Rep. 188.

(x) 2 Com. on Con. 556.

(y) 13 John. 56.

(z) 3 Campl. Rep. 352. 1 id. 6.

& 7, pr. Ld. Ellenborough, G. J.

(a) Chipman's Rep. 45.

(b) 1 Campl. Rep. 4.

(c) 1 Starkie's Rep. 20.

(d) 3 John. 534.



the slave should be made to the purchaser, before a suit will lie for the price. (e)

I deposit a carriage with you, and another of my creditors, to be sold for the payment of my debt, due to you and him.— Instead of selling it, you keep it a year, use it as your own, get it repaired at your own expense, and on your own account, the other creditor refusing to join in the repairs; and you, moreover, offer to sell the carriage, at several different times. In an action for his debt, against you, by the other creditor, for whose benefit, as well as your own, it was deposited, you are liable as for money had and received, or at least upon the special circumstances of the case, upon the presumption, that you have elected to become the purchaser yourself, because you might, and *should* have sold the carriage, at some rate, within that time. (f)

3. This action lies for *work, labour and services*, care or diligence, done, performed or bestowed, for the defendant, either as a common labourer, a mechanic, or in the line of one's profession; and it may, and frequently does, include a charge for materials, and other necessary things, used and employed, in and about the particular service performed; and in declaring, both the service and materials, are generally charged in the same count; as where a carpenter finds nails, or a physician medicines. And in this action, as well as that for goods sold, if there be no price agreed on, for the services or materials, the law implies a promise, to pay what the servant reasonably deserves to have, which desert, in both instances, is to be valued by witnesses, acquainted with the subject.

It is worthy of notice in the out set, for all those employed on hire, that where there is an agreement to work so long, at such a price, or an agreement to do a particular piece of service, at a certain price, or to work so long, or do a particular piece of work, without any specific price agreed on, the party employed, has no right to go forward, and perform for a part of the time, or a part of the job, and then break off, without his employer's consent, and bring his action for the work as far as he has gone; on the contrary, a strict performance, according to agreement, is a condition precedent; and unless the servant fulfils it, to the utmost of his capacity, he can recover nothing. But in the case of an infant, whose contract is void, it would undoubtedly be otherwise; for, though he is not bound to fulfil his agreement, on his part, the very circumstance of its being void, or, in fact, as

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(e) 11 John. 172.

(f) 16 John. 225.

no agreement, leaves it open for the law, to imply a promise of compensation, for the work which he has actually done, according to the reasonable value ; nor, if he completed the work, would he be bound by the price agreed, if it should turn out to be unreasonable, all of which we shall remark upon, more at large, under the proper head, in the course of this work.

A case has recently arisen, in the supreme court, on *certiorari*, illustrating this notion of a strict fulfilment, by the servant, before he is entitled to his wages, which, as the subject is important in common life, and this doctrine stood involved in some confusion, by the English cases, deserves particular notice.—*Vanderlip* contracted with *Mc Millan*, the owner of a factory, to spin for him ten and an half months, to be paid three cents per run, for the yarn he should spin. *Vanderlip* entered upon the execution of his contract, and spun till his services, at the rate agreed on, amounted to about twenty-five dollars, and then, finding his bargain a hard one, he quit, before the expiration of the time, and brought his action for the work done. *Mc Millan* kept regular debt and credit, in his book, charged *Vanderlip* with three dollars paid, and credited him with the work, at so much a run. On this evidence, the jury before the justice, found a verdict in favour of *Vanderlip* for twenty-two dollars and thirty-five cents ; but the Supreme Court reversed the judgment, holding the contract to be entire, that its performance was a condition precedent, and no suit would lie, until performance of the ten and a half month's service. (g)

And where the plaintiff, a joiner, agreed to work for the defendant, in his cotton factory, about making machinery, for one year, at one dollar per day ; the defendant to settle with the plaintiff, at the end of every three or four months, and instruct the plaintiff how to make such machinery, and the plaintiff quit at the end of three months, it was holden that the plaintiff could not have recovered any thing for his work, had not the contract been modified ; and the Supreme Court likened it, in their opinion, to the case of *Mc Millan* and *Vanderlip* ; but, as the defendant in the last case had, at the end of the first three months, not only settled with the plaintiff, but gave him his promissory note, this was holden a modification of the contract, for so much, and the plaintiff was allowed to recover ; (h) and so, where the employer gave an order, before the servant had worked his whole time, though he had gone away, it not appearing to be contrary to the will of the employer, the order not being paid, an action for work, &c. was held to lie. (15 John. 224.)

(g) 12 John. 165.

(h) 13 John. 53.

And so, where the plaintiff agreed to log up, burn and clear, fit for sowing, in a farmer like manner, ten acres of land, by the 20th September, to be paid at the rate of eight dollars per acre; and the plaintiff did clear part of the land, but put up no fence, and then quit the work, of his own accord, without the default of the defendant. It was holden that the plaintiff could recover nothing.(i)

So, where a sailor hired for a voyage, and took a promissory note, from his employer, for thirty guineas, provided he proceeded, continued, and did his duty as second mate, from *Kings-ton* to *Liverpool*, but died on the voyage; it was holden that no action lay, for what he had done.(j)

So, where M. agreed with H. to erect and finish a barn, by such a day, for 400 dollars; but performed only a part, and left it unfinished, without H's consent. It was holden that M. could recover nothing, for what he had done.(k)

And so, where a sailor contracted, for certain wages, to serve the master of a ship. and not depart the ship without leave, until the voyage was ended, and the vessel discharged of her cargo; although the vessel have arrived at her port of discharge, and is there moored, yet if the sailor quit the vessel, without leave, before the cargo is discharged, all his wages are forfeited, and he can recover nothing.(l)

But if there be a special agreement, and the work be done, though not in pursuance of it, and the variations are with the assent of both parties; or, with the like assent, there is an extension of the time, within which it was to be performed, and it is performed accordingly, an action in such case lies, for what the work done is reasonably worth.(m). And indeed where the agreement, though part only be performed, is abandoned by the consent of both parties, or through the default of the defendant; or, where the defendant has used some of the materials, intended by the plaintiff, to be used about the work, after the time had elapsed for finishing it, although the contract be not fulfilled, yet the plaintiff may recover what he deserves, for the work done, or the materials thus converted.(n)

And where work is to be done according to a special agreement, regulating quantity, price and time of payment, and the

(i) 13 John. 94.

(j) 6 T. R. 320.

(k) 2 Mass. T. R. 147.

(l) 13 John. 390.

(m) id. 97. 10 John. 36. Bull. N. P. 139.

(n) id.

parties have, by mutual consent, so far deviated from the original contract, that its terms do not apply to the new work, this action lies for the new work, though the time for making the payments has not expired, the deviation and new work under it, being considered a distinct agreement.

As where the plaintiff agreed to repair a vessel, according to an estimate which had been made, to be paid therefor one hundred pounds, at the end of a fortnight, the like at the end of four weeks, the like at the end of six weeks, and the remaining sum of three hundred and twenty pounds, by an approved bill at six months, with interest. The plaintiff worked for some time on the original plan, when the parties deviated from it; and the repairs were completed, in a manner, different from the plan mentioned in the agreement; Gibbs, C. J. decided, that, as there was nothing in the original agreement, to govern the new work, according to the stipulations of paying each fortnight, and the final sum by a bill, &c. the plaintiff might sue immediately, on the completion of such new work, and recover for it, though the credit agreed on had not expired, and he added, "there being nothing in the original agreement, to govern the new work, according to the stipulations in that agreement, the time of payment could not be applicable;"<sup>(o)</sup> and the plaintiff recovered for the additional work. But the special contract shall be made to apply, as far as it can be traced by the work, and for that, it was holden, that the plaintiff must wait, till the credit had expired.<sup>(p)</sup> And where some additions are made to a building, beyond those required by the original contract, by which the workman contracts to finish it, for a certain sum of money, the contract shall exist as far as it can be traced to have been followed, and the excess, *only*, paid for, according to the usual rates of charging; and if a man contracts, to work by a certain plan, and that plan is so entirely abandoned, that it is impossible to trace the contract, and say to what part of the work it shall be applied, in such case, the workmen shall be permitted to charge for the whole work done, by measure and value, as if no contract at all had ever been made. In this case, the addition and deviation from the original plan, was by an alteration of the roof, for which it was admitted the plaintiff was entitled to pay, as under a new and distinct contract.<sup>(q)</sup>

But these cases are understood to be, where the deviation is with the employer's consent, or he accepts the work; and the

<sup>(o)</sup> 1 Starkie's N. P. Rep. 275.  
1 Holt's N. P. Rep. 236, S. C.

<sup>(p)</sup> *Id.* Penke's N. P. cas. 163.  
<sup>(q)</sup> Peak's cas. N. P. 163.



same rules apply to any other kind of work, as well as that performed upon buildings.

Where there is a sealed agreement, to do work, part of which is done, in pursuance of the agreement, though the workman is prevented completing the work by his employer, he cannot bring this action, but should sue in covenant on the deed. (r)

An action lies for the services, labour, attendance and medicines furnished, by a physician, surgeon or apothecary ; (s) but such claim cannot be sustained against the owner of a slave, for services, &c. rendered without his consent or knowledge, unless in a case requiring immediate assistance ; (t) but in such case it will lie against the master of a slave, or (it is presumed) an indented servant, or the father of a child ; (u) and so will an action against the overseers of the poor, for medicines, &c. furnished a casual pauper, for whom they are bound to provide ; (v) but in such case, the physician, &c. must either be employed by the overseer, or with his assent or knowledge, or else the overseer must expressly promise to pay, after the service performed, or he would not be liable. And indeed, it is the duty of an overseer, to avoid acting in this particular, until he obtain a justice's order for relief, who has a right to designate the attending physician in the order. (w) But notwithstanding, if the overseer promise to pay for such services, or necessities, &c. are furnished at his request, though without a justice's order, an action will lie against him. (x) But such an action will not lie against the master, for medicines, &c. for his hired servant, unless on the request, and upon the retainer of the master, on his own account. (y) Nor will an action lie against such master, by the overseer of the poor, for necessities, &c. furnished, during the sickness of his hired servant. (z)

In an action for services, whether common, mechanical, or professional, except in the case of attorneys, solicitors, and counsel, the defendant may mitigate the damages, or defeat the action altogether, according to the justice of the case, by

(r) 4 Cranch, 239.

(s) 3 Esp. Rep. 192.

(t) 10 John. 249.

(u) id.

(v) 10 John. 249. 3 Esp. Rep. 91.

3 Bos. & Pull. 247 ; but vid. 2 East, 505, *contra*.

(w) 2 East, 505. 12 John. 352.

(x) id. & 1 Barnwell & Alderss. Rep. 104. 15 John. 281.

(y) 3 Bos. & Bull. 247. 2 Esp. Rep. 739 ; but vid. 1 Esp. Rep. 270, *contra*.

(z) 2 Esp. Rep. 739.

shewing that the services were done unskilfully, and are worth less than the plaintiff's claim, or worth nothing ; and this, especially where no price is agreed, but left to be implied by law ; and even where a certain sum is stipulated for the work, this defence may be set up, by giving the plaintiff reasonable notice of such defence, or the defendant may pay the price charged, and bring a cross action for the damage ;(a) but he should not, in such case, suffer the plaintiff to take judgment against him, without introducing his defence, for such trial and judgment, as we shall see more at large hereafter, would entirely cut off his remedy, by a cross action.

It seems agreed, in England, that no action will lie, either by a counsellor at law, to recover fees for his services, or against him, for neglect in managing a cause, or other neglect, or want of skill, in the discharge of his duties.(b) How the latter question would be determined, in this country, is not known ; though I believe it has never been questioned, that an advocate may here bring his action, for the recovery of a compensation for his services, the same as an attorney or solicitor. The latter may maintain an action of *assumpsit*, for their fees and disbursements. Before prosecuting this action, or at least before the trial, it is highly judicious to have their bills taxed by the proper officer, which liquidates the amount, and supersedes all inquiry as to items. Formerly an attorney, solicitor, &c. were bound to furnish their client with a bill, at least 8 days before suit brought ;(c) but this law is now repealed.(d) Under that law, if a bill were duly delivered, it was holden conclusive upon the client, as to amount, unless he procured it to be taxed before the trial. As the services, generally, must be proved at the trial, but the bill cannot be taxed there, nor the items entered into, it would now be advisable for the attorney, &c. either to procure the bill taxed, on his own part, as above mentioned, or at least, as formerly, to serve his client with a copy, either of which it is conceived would, as heretofore, be conclusive upon the client, as to items, unless in the latter instance, he objects to the amount, and procures a taxation,(e)

The negligence of an attorney, (and it is presumed upon the same ground, that of a solicitor, or counsel) cannot be set up,

(a) 7 East, 479. 2 Com. on Con. 363. 2 Wills. 339. & vid. 14 John. 377.

(b) Vid. cases cited, 2 Com. on Con. 373.

(c) 1 N. R. L. 417. s. 9.

(d) Laws, sess. 41 c. 259. s. 13.

(e) Doug. 198 & 199. 12 John.

as a defence, in an action upon his bill ;(*f*) though without doubt, a cross action will lie for the negligence, ignorance, or unskillfulness, either of an attorney or solicitor, in managing a cause ;(*g*) but not where he errs, or mistakes the law.(*h*)— And in this action for fees, the plaintiff must shew his retainer, either expressly, or by some act of his client, recognizing him as the attorney in the suit ; for the name of the attorney, merely standing in the judgment record, as the attorney of the defendant, will not itself be sufficient.(*i*)

Commissioners to examine witnesses, appointed by the Court of Chancery, Supreme Court, or Court of Common Pleas, may sue the party procuring their appointment, for their fees ;(*j*) but an arbitrator cannot maintain an action for his trouble, unless the person who employs him, has expressly promised to pay him ;(*k*) but it lies by a sheriff, justice, coroner, constable, &c. for their fees, against the party whose process they serve, or at whose request the service is performed : by a sheriff, constable, &c. for committing one on execution, who is afterwards discharged under the act, for the relief of debtors from imprisonment :(*l*) and it lies for fees in serving an execution, or other process, immediately on the arrest, or other service completed ;(*m*) though for levying a fine, they cannot charge their fees against the party, but should charge them in their accounts with the publick ;(*n*) nor are they entitled to fees, for arresting a person, while privileged from arrest, such arrest being irregular and void.(*o*) But in all cases, where an officer can protect himself, under the process, or would be liable for an escape upon it, that is to say, in general, when the process is valid, upon the face of it, whatever irregularity there might have been in issuing it, he may recover his fees of service.(*p*) The sheriff may, in all cases, collect his fees of the attorney ;(*q*) and, after a jury is summoned for the circuit, or other court, though before the court arrive the sheriff goes out of office, he is entitled to his fees, for summoning the jury, though not for returning the venire, and this, whether any venire be actually delivered to him or not.(*r*) He may recover his reasonable fees and expenses, on bringing up a former sheriff, on attachment for a contempt, in not returning process,

(*f*) 5 Bos. & Pull. 136. 11 John.  
547.

(*g*) 2 Wils. 325.

(*h*) 4 Burr. 2060.

(*i*) 9 John. 142.

(*j*) Carthew, 208.

(*k*) 4 Esp. Rep. 47.

(*l*) 4 Mass. T. R. 411.

(*m*) 5 John. 252.

(*n*) 1 Caines, 13.

(*o*) 10 John. 93.

(*p*) 13 John. 378.

(*q*) 9 John. 114.

(*r*) 6 John. 125.

bringing in the body, &c. and these are to be recovered of the party, on whose application the attachment issued ;(s) and his fees for going to, and returning from the Supreme Court, have been fixed at \$3 per day.(t)

As to the proprietors of stages and post chaises for passengers, if I pay only one half my fare, by way of deposit, and am not at the inn by the starting hour, my place may be supplied by another, but not so if I pay the whole fare.(u) Such proprietors are answerable for any injury arising from the misconduct of their drivers ;(v) and although a person keeping horses and chaises for hire, cannot be compelled to hire out a horse and chaise, yet if he does hire it, and the passenger takes his seat in it, the driver must proceed, if the fare is tendered.(w)

A person who, by his own labour, preserves goods, which the owner, or others for him, have abandoned in distress at sea, or are unable to protect and secure, may retain possession of them till paid for his trouble, and he may have his action for such trouble, or the owner may tender him a proper compensation, and demand his goods, and in default of their being delivered, bring his action of trover.(x)

In an action by a New-York pilot, against the owner of a ship, to recover *pilotage*, under the act (Sess. 28, c. 28) it was held that the situation of the ship, at the time the pilot takes charge of her, is a matter of fact and may be proved by *parol* ; and that the pilot, on sufficient proof, is entitled to his *pilotage*, though he did not cause an entry to be made in the *log book*, of the bearing and distance of the light house, at the time he took charge of the vessel, according to the rules of the master and wardens of the port of New-York, for the regulation of pilots, though he may be subject to a fine for not making such entry. And the fact that the pilot left the vessel, without permission of the captain, as required by the rules of the master and wardens, will not deprive him of his right of action against the owner, for *pilotage*, provided he left a competent substitute on board, by reason of his being unable to perform his duty himself. But such substitute must be a regular *branch* or *deputy* pilot, otherwise, he is not entitled to his *fees*, under the act, though perhaps the substitute, or his principal, might have an action against the ship owner, for what he *reasonably deserved* to have for the service performed.(y)

(s) 9 John. 328.

(t) 13 John. 123.

(u) 1 Esp. Rep. 27.

(v) Peake's cas. N. P. 31.

(w) 4 Esp. Rep. 260.

(x) 1 Id. Raym. 393. Abbott on shipping, 356.

(y) 10 John. 112.



\*An agreement with a clergyman, to give him so much for preaching, is a valid contract ;(z) and where I promise a man 50 dollars, if he will complete such a purchase or sale, this binds me ; and so, if I promise him, that A shall pay him 50 dollars for such service ; and in the latter case, I am the principal debtor, as well as in the former, and he may sue me without resorting to A.(a) A promise to pay for trouble, in procuring a pardon, is binding ;(b) and a clerk employed at £200 salary per annum, payable quarterly, being dismissed by his employer in the middle of the quarter, who paid him only proportionally, it was held that in this action, *for work and labour*, he might recover his salary for the remainder of the quarter, and was not bound to go upon the special contract ;(c) and in all cases, if the agreement be not under seal, though it be never so special and multifarious, if the services be performed under it, and the agreement thus fulfilled, the plaintiff need not in an action, set it forth and declare upon it specially, but may claim and recover under a general count, *for work and labour* ;(d) and so, if the work be done, though not in pursuance of the special agreement, but upon some new arrangement or agreement of the parties ;(e) and in this last instance, it will lie, even though the first agreement were under seal.(f)

Wherever services are performed gratuitously, or with a view to a legacy, they are not the subject of an action, though where they are performed with a view to a legacy, and the employer dies without making any provision by will, for the servant, an action will lie against his executors.(g)

Where I agree to buy land of you, and enter upon and improve it, under the contract, but you refuse to convey, by reason whereof the contract is rescinded, no action will lie for my work and labour ;(h) nor will it lie for my work, &c. where I enter upon your land without your consent, and without any color of right, and clear and improve it, and hold the possession against you. And in such case, as there is neither a legal nor a moral obligation for you to pay me for my labour, even if you promise to do so, I cannot hold you, and your promise is void.(i)

(z) 1 Sid. 409. 10 John. 244.

(a) Fitzg. 302.

(b) Hob. 105. But vid. 3 Esp. Rep. 253, *contra*.

(c) 1 Starkie's N. P. Rep. 198.

(d) Fitzg. 302.

(e) 10 John. 36.

(f) 14 John. 330.

(g) Stra. 728. Esp. N. P. 87, & vid. 1 Esp. Rep. 187, 3 John. 199, 13 John. 379.

(h) 5 John. 85.

(i) 5 John. 272.

The mother of a bastard child cannot sue the overseers of the poor, for its maintenance, without an express promise by them to pay, or a request to maintain it, or proving that they had received money for the purpose of maintaining it, under an order of filiation and maintenance ;(j) and an action for services done or necessities furnished, towards maintaining an indigent parent, will not lie against a child, unless done or furnished on the child's request, for there is no moral obligation in the child to support his indigent parent, and therefore there is nothing in such case to sustain an express promise. The only remedy against such child, is given by (1 N. R. L. 286) ;(k) and an action will in no case, lie at the suit of the overseers of the poor, against a pauper for labour, pains and expenses, in taking care of him, whether he be settled in the town or not, for such assistance is always intended by the law, as matter of charity.(l)

4. *For money had and received, by the defendant, to the plaintiff's use.* It is a general description of all cases, in which the action of *assumpsit* for money had and received lies, that the defendant is obliged, by the ties of natural equity and justice, to refund, or pay money, which he may have received, belonging to the plaintiff.(m)

1. It lies, therefore, to recover all moneys received by an agent for his principal, an attorney for his client, a sheriff or constable on execution, or a justice in the course of his business, who all in some degree, stand in the relation of agents to the party for whom they receive it.

2. To recover back money paid under a mistake, or through the deceit of the other party ; as if two men reckon together, and one over pays the other, through mistake, the money so overpaid, becomes money had and received to the use of the party paying it ; or if a man falsely tell me he has paid certain money, or done certain work for me, and I pay him for it, the money so paid by me, becomes, by this deceit, money had and received to my use.

3. To recover back money paid, upon a consideration which happens to fail.

As if I pay a man for carrying my goods, and he fails to carry them without my fault, or I advance money to a man, upon his

(j) 12 John. 195.

(k) 16 John. 281.

(l) Chipman's Rep. 45.

(m) 2 Burr. 1005. Doug. 407.

promise to sell and deliver me certain goods, and he fails to do so, I can recover the money so paid, in either instance, in an action for money *had and received to my use*.

4. To recover back money paid to any one, acting *under or in pursuance of, a void authority*; as if a man come to me, in behalf of my creditor, with a forged order or power of attorney, to receive the money, and I pay him the debt; although we both supposed the order or power to be good, yet the authority, being in fact forged and void, I can recover the money back in this action.

5. To recover back money obtained from any one by *extortion, imposition, or taking an undue advantage of the party's situation*.

As where I pledge my horse for a debt of one hundred dollars and the interest, and I tender the sum due, and demand the horse, but the bailee refuses to re-deliver him, unless I pay an additional sum beyond what is due; which I comply with; or if a man sells me lands, which have no existence, and I pay him the money therefor. So, where my friend is insolvent, and I give one of his creditors a sum of money to induce him to become a petitioning creditor, or to grant a letter of license; or if an officer, as a sheriff or constable, extorts money or charges and receives exorbitant fees, in all these cases the money thus paid may be recovered, as *money had and received to the injured party's use*; but it does not lie to recover back money, paid under an order, decree, or judgment of a court, although such proceeding may be fraudulent.

6. This action lies, to recover back money *embezzled*, or which any person has been defrauded of, by cheating, or otherwise; as where money is embezzled or stolen by a man's clerk, servant or any other person, or if a person is cheated of money at play, by the use of false cards or dice.

7. To recover back money, paid under an erroneous judgment or adjudication of any court, if the same is afterwards reversed, as if I pay money on a justice's judgment against me, which is afterwards set aside on *certiorari*. I can recover the money back, in this action, from the opposite party.

8. Where any species of contract is declared void, by *common law or statute*, money paid in consequence of such contract, may be recovered back in this action, provided the party paying it, is not *himself* a party in the *criminality*.

As where money has been paid for usurious interest on a loan, or on a pledge of goods ; but not if both parties are equally criminal, as if a party, being a voter, pay money on a bet upon the event of an election, made before the election ;—nor will such action lie against the stake holder, even before the money is paid over.

In pursuance of the above principles, and others, which relate to this action, for money had and received, the following decisions have from time to time taken place : That it lies against a person receiving the fees and emoluments of an office, belonging to the plaintiff, under pretence of title, 2 Mod. 260, 2 Lev. 245, s. c. 2d Shower, 21, s. c. T. Jones, 126, s. c. 1 Freem. 473 ;—against a sheriff, for money levied on an execution, Comb. 430, per Holt, Ch. J. ;—against the assignees of a bankrupt, for money due on the commissioner's order of dividend ; and, upon the same principle, against the assignees of an insolvent debtor, for a dividend declared or due, Doug. 407 ;—for money paid under the authority of an illegal court, [the high commission court before the revolution] 1 Ld. Raym. 742, pr. Treby, C. J. —or levied by a justice's warrant, on a conviction afterwards quashed, Bull. N. P. 131, cited in Cowp. 419 ; for money paid to an auctioneer, as a deposit on the sale of property, the title to which is defective, 5 Burr. 2639 ;—for money deposited for a particular purpose, but misapplied, 2 Bos. & Pull. 277 ;—for money paid under a written agreement, which the defendant was unable to perform, 2 Esp. Rep. 639, or which he failed to perform ; and that, even though the written agreement be sealed, 1 Caines, 47 ;—for the deposit money, on the purchase of property, where there is a reasonable objection to the title, 3 Bos. & Pull. 162, 181 ;—for money paid on a contract, which, by the defendant's default, could not be performed, 7 T. R. 181 ;—for money paid on a conditional sale, which was rescinded, 1 T. R. 133 ; for the purchase money of land, where none could be found of the description contained in the deed, 1 Dal. 428 ;—when a purchase is made, if the money is paid, and the thing contracted for not delivered, 1 Stra. 407, pr. King, Ch. J. ;—for a return of premium, upon a policy of insurance, when the risque never commenced, 3 Burr. 1237 ;—against a nurse, who upon the death of a person she attended, embezzled his money, Bull. N. P. 130 ;—against a person to whom goods were pledged, and who refused to deliver them, without payment of more than was due ; action brought for the money overpaid, 2 Str. 915 ;—against officers of the revenue, who seized goods for not having a permit, when in fact they had, and refused to deliver them, without payment of such money, 4 T. R. 485 ;—for money paid to a lottery office keeper, for an illegal insurance, 2 Blac. 1073, 1 H. Blac. 65, Cowp. 790 ;—for money of the plaintiff expended by his clerk, in such illegal insurances, with-



out the plaintiff's privity, Cowp. 197 ;—for money paid, to induce a creditor to sign a bankrupt's certificate ; and, by parity, it is conceived the same rule would apply to money paid, in order to induce a creditor of an insolvent debtor, to withdraw his opposition to a discharge, under the insolvent act, Doug. 696, 3d. ed. in note (3) ;—against a person who had got possession of a masquerade ticket, belonging to another, on the presumption that he had sold and got money for it (the defendant having notice of the nature of the demand) Doug. 137 ;—against one who gets the money into his hands, on a collateral security for a debt, which he owes to another, but neglects to pay the principal debt, Cowp. 571 ;—by the owners of a vessel, for fees unduly paid by the master, to a custom house officer, Cowp. 805 ;—for money paid, in consideration of a void bond, 2 Bos. & Pull. 467.

The above instances, in which this action lies, I have taken from Mr. Day's note to *Marriott v. Hampton*, 2 Esp. Rep. 546. The following, are mostly instances, which have arisen and been decided, since the publication of that note :—

Against an insurance company, for refusing to assign certain shares of stock, which had been bought of the owner, and paid for, until the purchaser had paid certain notes, which the former owner owed the company, such former owner being insolvent, 3 John. cas. 238 ;—against a collector of the customs, to recover back tonnage duty, or light money, wrongfully demanded and paid, in order to obtain a clearance, 9 John. 201 ;—against a district clerk of the U. S. for fees paid him, in a suit relating to the wrongful seizure of a vessel, he refusing to give an order for re-delivery, until such fees were paid, 9 John. 370 ;—against one who has received goods of another, to pay a debt to a third, out of the proceeds, which goods are sold, even though the debtor had previously assigned the goods to a fourth person, without the knowledge of the one who received them in trust, (such third person may have the action) 1 John. cas. 205 ;—against one tenant in common, who has sold the thing in common, and received the money, 2 Caines, 166 ;—against one who receives the money of another, and applies it to his own use, 3 John. 183 ;—against a bank, for money deposited by one for himself, but which the bank, without his consent, carries to the account of another, 2 Caines, 337 ;—for money paid on a contract, afterwards rescinded, 5 John. 85 ;—against an attorney or agent, who discharges the debt of his principal, which he is employed to collect, by applying it to his own debt due to the debtor, who owes his principal, or, where he obtains judgment for his principal, becomes himself the purchaser on the execution, and pays for such purchase by discharging the judgment, or takes the debtor's negotiable paper, and discharges the debt, 11

John. 464 ;—against one who receives securities to collect, and, after answering certain specified demands, to pay over the balance to such one as the person delivering shall direct, who, on the money being collected, orders the money to C. who may bring the action ; nor can the trustee protect himself against the action, by setting off a claim which he may have against the one who gave him the securities, 12 John. 276 ;—by one who has paid money in advance for services *to be* performed, but which are not performed, 12 John. 363 ;—by the creditor of an intestate, against the administrator, who has drawn an order in favour of the creditor, for the debt of his intestate, which order is not accepted, but has in fact been credited to the administrator, in his account with the surrogate, 13 John. 510 ;—against a tenant in common, who receives the whole of the purchase money, on a sale of the common property, 15 John. 159 ;—by one who has bought land by parol, and delivered a note to the seller, who has received the money, (such contract being void, by the statute of frauds) 15 John. 503. ;—for money of a stake holder, on an illegal wager, notice being given not to pay it over, 11 John. 23 ;—reversed on error, 12 John. Rep. 1, contra ;—for money paid on the return of a bad check, supposed to be sent from one bank to another, which discovered it to be bad, and returned it ; it having been returned to, and paid by, the wrong bank through mistake, 3 Mass. T. R. 74 ;—against the obligor of a bottomry bond, for the money lent, the vessel being captured and condemned, but such condemnation reversed, and a compensation awarded and paid to the obligee, 3 Mass. T. R. 443. Whether for money paid under false and fraudulent pretences, for a quit claim deed of lands ? Quere, 2 Day's Rep. 252 ;—against a collector of taxes, who advertises the lands of several non-residents for sale, for taxes, and receives the whole expense of one of them, *id.* 369 ;—against A, who falsely represents himself to be a soldier, and sells for money, his pretended right to land as such, *id.* 337 ;—by A, against B, in whose favour an award is made, and the money paid, B being merely the nominal party, and a trustee for A, 4 Mass. T. R. 326 ;—against one obtaining money by over reaching, false allegation, or fraudulent concealment, 4 Mass. T. R. 488 ;—against an attorney, who receives partial payment on a note, which he pays to his client, but goes on and takes judgment, and collects it for the whole of the note, 7 Mass. T. R. 14 ;—for money paid on a contract void, for want of power in the opposite party, or any other cause, besides fraud or illegality, *id.* 31 ;—against one withholding money, contrary to the rules of equity and good conscience, *id.* 286 ;—against one who receives money for a specific purpose, and fails to apply it, 3 Day's Rep. 252 ;—against one who has received notes to collect, or return and account for them, when demanded, he having collected them, 4 Day's Rep. 175 ;—by A, against one who has received money

of B, and promised B to pay it over to A, 11 Mass. T. R. 147 ;— against one who *bona fide* sells and receives the money, for a note payable to B, or order, and purporting to be indorsed by B, but whose indorsement was, in fact, forged, 3 Yeate's Rep. 531 ;—against one who has received funds (converted into money) to pay a debt to a third person, and promises to pay it, 3 Harris and Mc Henry, 451 ;—against one who sells a void land warrant for money, 1 Tennessee Rep. 438 ;—for money paid, in order to compound a *qui tam* action, contrary to the statute concerning common informers, 8 East, 378 ;—for bills paid in by a customer to his banker, and by him credited as cash, such bills not being due from the customer, and the account with his banker being in his favour, independent of the bills, 9 East, 12 ;—for money voluntarily paid to a magistrate, to be applied to the use of the poor of the town, to avoid a prosecution by the magistrate, for assisting in the escape of a prisoner for a misdemeanor, especially if brought before the money is applied, 9 East, 49 ;—by the winner against a stakeholder of country bank notes, who paid them back to the staker, after he had lost the wager, 13 East, 20 ;—by the owner of a bill lying in the banking house, against the banker, who has received money to pay it, though the banker's clerk, who received it, said he could not give up the bill, till he had seen his master, 14 East, 590 ;—against a landlord, who had agreed to allow to his tenant, towards the rent, the property tax, to be paid by the tenant, who pays it, and notifies his landlord thereof, who afterwards distrains, and sells for the whole rent, 1 Maule & Selw. 609 ;—against one holding a bill in trust, who sues the drawer, whom the sheriff suffers to escape, and the trustee afterwards recovers the money of the sheriff ; deducting all proper allowance for costs and trouble, &c. *id.* 714 ;—against an agent for money paid by mistake, though he has passed such money to the credit of his principal, before notice of the mistake, 3 Maule & Selw. 344 ;—for money obtained on a bill of exchange received in advance, on a contract to sell goods, but which are not delivered, 4 Maule & Selw. 476 ;—for money paid under terror of a threatened distress, which is unauthorized, 1 Taunt. 359 ;—for money deposited on an illegal wager, before the event of the wager has happened, 3 Taunt. Rep. 277 ;—by a boxer against his stakeholder, on the event of a boxing match, after he had boxed ; he demanding it, before it was paid over, 4 Taunt. Rep. 474 ;—for the money paid, by one who advances money to a broker, to pay duties on goods in his hands, upon his representation, that he could (by a sale of them) at a certain price, discharge his lien, and raise a surplus ; such sale being defeated, 5 Taunt. 446 ;—by one who discounts a forged navy bill for another, who did not know of the forgery, and so of forged bank notes, 5 Taunt. 488, [T



protect an agent against this action, it must not only appear that he paid over the money before notice, but that he received it, expressly for the use of his principal; he must not mislead the plaintiff, by omitting to say that he has paid it over, and if he was in any way apprized, that the payment over was improper, he is liable notwithstanding the payment over, 1 Taunt. 359, 5 Taunt. 815;—and in an action to recover back money, deposited with a stake holder, as a bet upon a horse race, under the act, (Sess. 25, c. 44) it is no excuse that the defendant has paid over the money to the winner, without notice, 10 John. 468. Against partners, for money paid on the false representation of one of the firm, in a partnership transaction, 2 Barnw. & Alders. Rep. 795;—for money fraudulently obtained, though the defendant is entitled to it, if his right depends upon a question not of common law jurisdiction, 1 Campb. Rep. 124;—by one, in whose behalf an agent has paid money, assuming to act in his own right, against the one whose agent has received the money, though the latter has not paid it over to his principal, 1 Campb. Rep. 337;—by one to whom a bill of lading of certain goods is indorsed, as collateral security of a debt due from A, against another creditor of A, who has taken a subsequent assignment of the goods from A, for his debt, and taken and sold the goods, 1 Campb. Rep. 554;—by a sheriff, who has levied the debt of goods not belonging to the defendant, and paid over the money to the plaintiff, against the plaintiff for the money so paid, the value of the goods having been recovered against the sheriff in an action of trover, 2 Campb. Rep. 452;—by the indorsees of a bill of exchange, against the drawee, who refuses to accept, but says he will accept as soon as he is in funds from the drawer, and afterwards receives money to discharge part of the bill (lies for the money so received) 3 Campb. Rep. 176;—by an acceptor of a bill, against the drawer, to whom he has given money to take up the bill, the drawer succeeding against a suit upon the bill, upon the ground that he had not a seasonable notice, 3 Campb. Rep. 107;—against an insurance broker, who, though he has received no money, in fact, on the policy, for his principal, had yet discharged the underwriter, the amount of whose subscription was allowed between them on account, 3 Campb. Rep. 199;—against a sheriff, without any demand of payment, who had returned to a *fi. fa.* that the money was levied, 3 Campb. Rep. 347;—by a consignor, against one of two joint consignees, for sale on commission, where one only, has, with the consignor's consent, assumed the whole trust, and sold and received the money, 7 Taunt. Rep. 403.

In *Longchamp v. Kenney*, Doug. 138, Lord MANSFIELD observed, that great benefit arises from a liberal extension of this action; because the charge and defence are both governed by the true equity and conscience of the case.



In the following instances, the action for money had and received has been held *not* to lie : where the defendant had entered into sealed articles to account, 2 Str. 1027 ;—against one who has money belonging to an estate, but has paid it to one having probate of a forged will, 3 T. R. 125 ;—by a lottery office keeper, against one, to whom he had paid money upon illegal insurances, Cowp. 790 ;—upon a warranty that a horse, exchanged by the defendant for one of the plaintiff, was sound, when it was not, to recover money given on the exchange, Cowp. 318 ;—when the payment has been made on a contract still open, i. e. neither fulfilled nor rescinded, Doug. 23, 7 East, 274 ;—where the defendant had impounded the plaintiff's cattle, *damage feasant*, and the plaintiff had paid the money charged, and then brought this action to try the right, Cowp. 414 ;—to recover stock in the funds, 5 Burr. 2589, 2 Blac. 684 ;—where a servant found bank notes, and showed them to her master, who took them, said they were not his, but refused to deliver them back—(the action should have been *trover*) Esp. Dig. 99, Dublin edition ;—against a tax gatherer, for a tax erroneously paid him, but which he has paid over, 4 T. R. 553 ;—for an over payment to such officer, Cowp. 66 ;—for a premium paid on a void insurance, after the risque insured against was over, Doug. 468 ;—for the premium paid on an illegal insurance, 3 T. R. 266, 1 East, 96, 3 B. & P. 35, 7 East, 449 ;—nor where credit was given for such premium by the broker, but no money actually paid, 3 East, 222 ;—for money deposited on an illegal wager, and paid over to the winner by the consent of the loser, 8 T. R. 575 ;—by the drawee of a forged bill, against an innocent endorsee, to whom he had paid the amount, 3 Burr. 1354 ;—on an agreement in consideration of the plaintiff's advancing forty-five pounds to the defendant, to buy goods with, on the defendant's note, payable on demand, to pay the lender the profits on a resale, the plaintiff having the same day demanded payment of the note, and the goods being afterwards sold on a profit of five pounds, Cowp. 793 ;—by executors, whose testator borrowed money on a prohibited *respondentia bond*, which they had refunded, to recover it back, 4 T. R. 561 ;—by a person against B, who had distrained goods and delivered them to him, on his promise to pay the rent, 4 T. R. 687 ;—for money paid for the use of a patent, which turned out not to be a new invention, 4 B. & P. 260 ;—in this action the plaintiff can only recover what remains, after deducting all just allowances, 4 Burr. 2133, vide 1 Salk. 28, and note (A) by Evans.

The above instances, in which this action has been held not to lie, are taken from the before mentioned note of Mr. Day ; the following are mostly instances arising and decided since the publication of that note

Against a public officer, who has collected and received money by order from his official superior, 1 John 515;—against an overseer of highways, for money collected under an assessment by commissioners of highways, *id.*;—whether for money paid with a full knowledge of the facts, though under a mistake of the law? *Quere*;—for money voluntarily paid by the plaintiff, to obtain performance of an agreement, for which he had no legal remedy, (*v. g.*) a parol agreement concerning lands, 4 John. 240;—whether to recover money voluntarily paid, to obtain property illegally withheld, for the recovery of which an action lies? *Quere*, *id.*;—to recover back money paid on a judgment in an inferior court, on the ground that the recovery of such judgment was unjust, 8 John. 470;—on the ground, that evidence has since been discovered of a good defence against a judgment on which the money has been paid, 9 John. 232;—by the maker of a note which he had paid, but indorsed after due, he neglecting to defend a suit upon the note, by reason whereof judgment went against him, 9 John. 244;—against a stake holder on an illegal wager, or one contrary to sound policy, as on a bet between two governor voters on the election, to recover the deposit, 4 John. 426;—whether it lies to recover the party's own deposit? *Quere*, *id.*;—where an illegal wager is lost and the money fairly paid, 8 John. 147. (In general, to maintain this action, the defendant must have actually received money, 11 John. 464;);—by the purchaser who has paid money on a parol contract to buy lands, where there is no default in the vendor, 12 John 454;—by the owner of land sold by the loan officers, for money paid the purchaser to release his interest, even though the purchaser had agreed by parol, to purchase as trustee for the owner, 13 John. 358;—against a vendor of land, who covenants to give a deed on payment of five hundred dollars by instalments, which are part paid, but not regularly at the time when due, by reason of which the deed is refused, and this, even where the residue of the money is withheld because the vendor will not raise an incumbrance upon the estate, there being no fraud, and the vendee not having entitled himself to a deed for the lands, by a strict payment of the money, 14 John. 363;—to recover back money paid on a judgment, for a debt against which the defendant had a receipt in full, which he neglected to use in his defence, 2 Esp. Rep. 546;—for money paid for a pretended title to lands, the seller being out of possession, 1 Mass. T. R. 65;—for a surety, who has paid the debt of his principal, (it should be for money paid, &c.) *id.* 139;—for a mistake in a settlement of accounts, (it should be a special action on the case) Kirby 127;—for money voluntarily paid, on an award of arbitrators, 1 Day's Rep. 130;—for money voluntarily paid, on a disputed claim, though the party paying, reserve his right expressly, *id.*;—against A, for money collected by him in the name of B, on a note and judgment

thereon assigned to him, to pay him a debt due from B, but which judgment is afterwards reversed, and B become insolvent, 2 Day's Rep. 153 ;—for money paid for a deed of land, with covenants, that after grantor's death, grantee shall have the land, the title failing, and there being no deceit, fraud, imposition or oppression, 4 Mass. T. R. 135 ;—by the agent of A, against the assignee for a valuable consideration of an award in favor of A, which award includes certain expenses, incurred about the subject matter of it, due from A, to his agent, 4 Day's Rep. 42 ;—for money paid under the sentence of a foreign court, on foreign attachment, where the proceedings were erroneous, 1 Yeate's Rep. 533 ;—by A, who was the owner of a cargo seized as French property, and which was in fact so, but A colludes with B, a Portuguese, under whose name A trades, in putting in and establishing his claim in the court of admiralty, as a Portuguese, in which he succeeds, and sells the cargo ;—(A not permitted to recover against B, by reason of the collusion) 12 East, 234 ;—against one who has received bills or notes from A, with directions to receive the money, and pay it over to B, A's creditor, though the bills or notes are paid to the one who thus receives them, he protesting against paying over the money as directed, (for the bills or notes under the circumstances, belonged all along to the remitter) 14 East. 582 ;—by a banker, against a partnership, for money paid by him and carried to the partnership account, upon a bill drawn by one partner in his own name, which bill is discounted by the banker, through the medium of the same agent, who procured the discount of other bills with the same banker, in the name of the firm, 15 East, 7 ;—by one who lays illegal bets in the defendant's name, and afterwards pays them, without a subsequent express direction, 4 Taunt. Rep. 165 ;—by one in whose name another makes a contract, sues upon it, obtains judgment, and receives the money, without the least privity of the person in whose name he does all this, 4 Taunt. Rep. 380 ;—for money paid under a full knowledge of the facts, but only a mistake of the law, there being nothing against conscience in retaining it, 5 Taunt. 143 ;—against a banker who receives from the agent of several persons, a sum of money to distribute among them, after the agent has drawn out part of it, and distributed it himself, 5 Taunt. Rep. 447 ;—for money paid, by the drawee of a bill of exchange, on which the drawer's hand writing is forged, or for money paid by the agent and banker of the drawee, when the acceptance is forged, 6 Taunt. Rep. 76 ;—by A, against his agent, whom A had directed to send money by a certain rout, but his agent sends it by another rout, to A's agent, by which means the money gets into the hands of A's creditors, 2 Campb. Rep. 68 ;—for money paid for goods delivered, agreeing generically with the sample and contract for delivery, but miserable in quality, and wholly unfit for use, (there should be



a special count on the warranty) 2 Campb. Rep. 416 ;—by a landlord against a sheriff, who had sold goods of tenant without paying the year's rent, (it should be a special action on the case). 3 Campb. Rep. 260 ;—where the plaintiff, upon the same transaction, would be liable in a cross action, to damages of an equal amount, 3 Campb. Rep. 291 ; against one with whom a sum of money has been lodged, to indemnify him against bills of exchange, still outstanding, which he has accepted for the accommodation of another, though such bills of exchange be barred by the statute of limitations, 3 Campb. Rep. 418 ;—against B, with whom A deposited one hundred pounds, to be distributed to A's creditors, in proportion to their claims, (lies not by one, till the proportions of all have been ascertained) 1 Starkie's Rep. 372 ;—against one to whom money has been paid, in trust for a specific object, (e. g.) for the purpose of conducting an action for breach of promise of marriage, until the trust is closed, and it is shown that a balance remains in the hands of the trustee, 1 Holt's N. P. Rep. 500 ;—against A, by the survivors of an insolvent firm, whose agent, having power to collect and pay debts, has left money with A to pay debts due from such firm, Anthon's N. P. Rep. 45 ;—by the overseers of the poor, against a pauper, to recover money advanced for his relief, Chipman's Rep. 45 ;—and wherever the retention of the money is consistent with natural justice, though the party could not have recovered it by law, this action does not lie to recover it back, as in the instance of payment of a debt, *barred by the statute of limitations*; or contracted *during infancy*; or to the extent of *principal and legal interest*, upon an *usurious contract*, or money *fairly lost at play*. *Moses v. McFarlan*, 2 Burr. 1005. But in the last instance, our *statute* authorizes the loser to recover back *money lost at play*, 2 N. R. L. 270.

In the above enumeration, as before mentioned, I have availed myself of Mr. Day's celebrated note to *Marriott v. Hampton*, 2 Esp. Rep. 546, Day's edition. [I have omitted a few cases, included in his note, which I conceived of no practical use to the New-York justice.] From the time at which that note ends, the reader will find, with very few exceptions, a full continuation of all the English and American cases, on the subject of the action for money had and received, without distinction, down to the present time. If, therefore, he wishes a more full view of the cases under this head, than he finds here, by taking Mr. Day's note, and using the above additions as a supplement, he will be gratified, perhaps, as far as diligent compression in both instances will admit.

5. FOR MONEY PAID, Laid OUT AND EXPENDED. for the defendan', as where I pay a debt at his request, or an accommodation note given by me for his benefit, or pay money for another as sure-



ty ;(n) or where one of several sureties pays the whole money, in which last case he may bring this action against the others, severally, for their shares ; and in case I am obliged to pay money for another in any other way, as if I, being a sheriff, or constable, the defendant escapes from an execution in my hands, leaving me to pay the debt, or if my goods being on the premises of another with his consent, are distrained for rent due from him, and I am obliged to pay the rent, in order to release them, I can maintain an action in these, and many of the like cases, for money paid, laid out and expended, against the person, by whose default I have been obliged to pay the money. But not, if I voluntarily suffer a defendant to escape, or, being a constable, if I let an execution in my hands expire, without demanding the money of the defendant, and then pay the money without the defendant's request ;(o) because, there must always in this action, be a request from the defendant, either express or implied. So, if a collector of taxes, pay over my tax to the county treasurer, without demanding it of me ; this being a voluntary payment, an action will not lie, to recover the money so paid.(p) But in these cases, if the money be paid, at the request of the party liable, or he afterwards promise to pay it, the action will lie.(q) Whether merely making the demand, and then paying over the money will sustain an action ? Quere.(r)

One joint contractor, who pays money for another, on a mere equitable claim, capable of being enforced only in a Court of Chancery, may have this action against his co-contractor ;(s) but where a contract is made by two principals, and a surety, and I pay the money, at the request of one of the principals, though I may have my action against both the principals, I have no right to sue the surety ;(t) nor will it lie against the acceptor of a bill, or the maker of a note, by an indorser, who has paid the money to an indorsee, without the latter having demanded the money of the acceptor or maker, and taken the proper steps to charge the indorser, for such payment is without cause, and in his own wrong ;(u) nor by an under tenant, whose goods are distrained to pay rent due from his lessor ;(v) nor by a wharfinger, who receiving goods consigned to A, which B takes by mistake, supposing them to be his own, and converts to his own use, in consequence whereof the wharfinger

(n) Kirby 137, 3 John. 249.

(o) 3 John. 434, 8 id. 438.

(p) 10 John. 361, id. 404.

(q) id.

(r) 10 John. 404.

(s) 6 Taunt. Rep. 289.

(t) 5 John. 176.

(u) 2 John. cas. 75.

(v) 11 East, 52.

pays the value of the goods to A, he cannot maintain an action against B, for money paid ; it should be trover for the goods ;(w) and this action will not lie by one of two joint wrongdoers, who has paid the whole damages for the trespass or other wrong, which they committed in company, against his companion ; for a wrongdoer is not liable to contribution, without an express promise.(x)

To sustain this action, it must appear that money has been *actually* advanced by the plaintiff, for if a surety discharge the debt of his principal by giving a bond ;(y) or even if he be sued and imprisoned for the debt of his principal, he cannot sustain this action, unless there be an express promise to indemnify him ;(z) but the giving a negotiable note to discharge the debt of the principal, would be equivalent to the payment of money.(a)

Where a dinner is ordered at a tavern, by the authority of two persons, who have laid a wager of a *rump and dozen*, if the winner pays the bill, he may maintain an action against the loser for *money paid*, to recover the amount, and such a wager upon the age of the two parties, is lawful, and the winner may sustain an action upon it.(b) And in proof and illustration of the above remarks on this action generally, vid. 2 Com. on Con. 149 to 204, & cases there cited.

6. FOR MONEY LENT AND ADVANCED by one person to another, this action of *assumpsit* also lies. So, for money advanced to A, at the request of B, who promises to pay it, an action lies against B, as for so much money lent and advanced to him ;(c) so, for money lent to a married woman, at her husband's request, an action lies against the husband ;(d) and where money is lent to one, at the request of another, it is a loan to the latter, and should be so charged in the declaration ;(e) and a declaration against *one* for money lent to *another*, at the defendant's request, is bad ;(f) but a declaration against the husband, for money lent to his wife, at his request, is good though if stated to be on the request of his wife, it is bad ;(g) and though the money be secured by a pledge, an action lies, unless there be an agreement to stand by the *pledge only* (h) —

(w) 4 Campl. Rep. 81.  
(x) 8 F. R. 186, 1 Campl. Rep.  
243, 2 John. Ch. Cas. 131.  
(y) 8 John. 202.  
(z) id. 249.  
(a) 8 John. 202.  
(b) 3 Campl. Rep. 162.

(c) 1 Burr. 373.  
(d) 3 Wils. 389. 7 Taunt. 432.  
(e) 1 Vent. 311. 2 id. 36. 6 Mod.  
77.  
(f) 2 Com. on Con. 130.  
(g) 7 Taunt. 432.  
(h) Stra. 919. Baile. B. R. 48. S. O.

in order to maintain this action, there must be an actual loan-  
ing of *money*, or what is equivalent thereto : a loan of *stock* in  
the publick funds, will not sustain this action ; but the len-  
der must declare on his special contract ; (i) and money lent  
to game with, is recoverable in this action for the statute, (1 N.  
R. L. 152) to prevent excessive and deceitful gaming, only avoids  
the security taken upon such loan, leaving the implied obligation  
the same as at common law. (j)

7. FOR USE AND OCCUPATION of lands, houses, rooms or oth-  
er real property. This action is given by statute, (1 N. R. L.  
444) and lies wherever the lease or agreement to use or oc-  
cupy is not by deed, even though there be a written agree-  
ment, at a stipulated rent, but not if such agreement be under  
seal.

And wherever the tenant occupies by permission from the  
plaintiff, whether there be any agreement or not, as to the a-  
mount of rent, this action lies, to recover the reasonable com-  
pensation implied by law. And the defendant will not be  
permitted, in such case, to question the plaintiff's title. But  
there should be some *demise*, or permission, otherwise trespass  
would be the proper form. (k) And where the defendant en-  
ters under an agreement to purchase, this action will not lie. (l)

If A agrees to let lands to B, who permits C to occupy them  
A may recover the rent in this action against B. And even  
where there is a sealed agreement to *give* a lease, and the de-  
fendant enters and occupies, yet this action lies, for his *actual*  
holding and possessing, is not under a deed which gives him any  
right to enter. And where the tenant holds over, after the ex-  
piration of a sealed or other lease, he is liable in this action ;  
and in the case of a tenancy from year to year, which is, where  
a tenant holds at an *annual rent*, generally, without being res-  
trained by agreement to a *particular time*, and especially if he  
holds under such an agreement for *more than a single year*, can-  
not exempt himself from the payment of rent for the *next year*,  
except, by giving his landlord notice of his intention to quit, at  
*least six months*, which six months must end with the *current*  
*year*, and this, whether the rent be payable *yearly or quarterly* ;  
and if the tenant quit without giving such notice, this action lies  
for the *year ensuing*, the abandonment of possession by the ten-

(i) 5 Burr. 2589. 2 Bl. Rep. 684.  
1 East, 1.

(k) Vid. 1 Esp. Dig. Gould's Ed.  
p. 56 to 62.

(j) Vid. cases cited, 2 Com. on  
Con. 144 to 149.

(l) 6 John. 46.

ant, unless the landlord have excepted some other tenant, or taken possession of the premises, or the like. If lodgings are let out for the purposes of prostitution, an action will not lie for the use and occupation of them.(m) Where a tenant holds over, the law implies a tacit renovation of the contract for another year ; and in such case, six months notice to quit must be given.(n) This six months means half a year : thus I am tenant from year to year, commencing on the first day of April, 1820 ; if I mean to save paying the rent of the whole year 1821, I must, as early as the first October, 1820, give the landlord notice, that I shall quit at the first of April, 1821.(o) This doctrine of notice applies only where there is a tenancy from year to year, not where there is an agreement or lease for a term certain, as for a year ;(p) unless the tenant hold over by the express or implied permission of the landlord, in which case a tenancy from year to year, will be implied ;(q) and this action lies, and the tenant cannot, in this case, defend himself on the ground that the landlord has no title.(r) This holding over will be impliedly on the old rent, unless there be some new agreement ; though where the old rent was merely a ground rent, and the landlord is entitled to the buildings erected by the tenant, a different rule prevails, and the annual value of both land and buildings is the measure of damages.(s)

8. ON VARIOUS CONTRACTS, IN THE COURSE OF A SUIT IN A JUSTICE'S COURT. The *form and nature* of these contracts, will hereafter be particularly considered, when I come to speak of adjournments and executions. If they are sealed, the action should be covenant.

#### 9. ON BILLS OF EXCHANGE AND PROMISING NOTES ; and 1 :

OF THEIR FORM AND REQUISITES. Bills of exchange are, either *foreign or inland* ; but as the former are generally large, and seldom, perhaps never, in practice do come in question before a justice's court, I shall confine my attention to the latter description only, premising that all bills of exchange drawn by one resident citizen of the United States, on another, are inland bills of exchange.(t)

A *bill of exchange* is an open letter of request, from one person to another, desiring him to pay on account of the for-

(m) 2 Vid. 2 Com. on Con. & cases there cited, 510 to 525.

(n) 1 T. R. 162.

(o) Vid. Woodfall's Landlord & Tenant, 218.

(p) 1 T. R. 54.

(q) id. 162.

(r) 13 John. 240. id. 297.

(s) 15 John. 505.

(t) 5 John. 375.



mer, a sum of money therein mentioned, to a third person; and is the same, which we call in common language, an *order* or *draft*, for the payment of money.(u) Its form is as follows:

\$50.

SARATOGA SPRINGS, September 1, 1819.

TWO MONTHS AFTER DATE (or "at sight," or "on demand," or "at ten days after sight,") PAY JAMES JACKSON, OR ORDER, (or "bearer," or "PAY JAMES JACKSON, simply, omitting "order" and "bearer," if you do not wish to make the bill negotiable,) FIFTY DOLLARS, FOR VALUE RECEIVED.

RICHARD ROE.

TO MR. JOHN DOE, MERCHANT,  
BALLSTON SPA, payable at your Store.

A *check* is only a *shorter bill*, governed by the same law, as a *regulr bill of exchange*.(v) Its form may be thus:

SARATOGA SPRINGS, Sept. 1, 1819.

MR. JOHN DOE,

PAY JAMES JACKSON, OR BEARER, FIFTY DOL-

ARS.

RICHARD ROE.

Here, the one who *draws* the bill, *Richard Roe*, is called the *drawer*; the one to whom directed, *John Doe*, the *drawee*, the one to whom payable, *James Jackson*, the *payee*. When *John Doe* accepts the bill, he is called the *accepter*; and if *James Jackson*, (the bill being negotiable) should *indorse* it, and deliver it to another, for instance, *John Stiles*, *Jackson* would then sustain two characters, being called *indorser*, as well as *payee*, and *Stiles* constitutes another party to the bill, called an *indorsee*; and should *Stiles* indorse it to another, he then acquires two characters, that of *first indorsee* and *second indorser*, and the one to whom he thus transfers the bill, is called a *second indorsee*, and so through any number of indorsements without limitation.

This *bill of exchange*, especially after acceptance, is very nearly allied to a *promissory note*, and I shall therefore consider them under the same head, noting their difference as I pro-

(u) 2 Bac. com. 466.

(v) 3 John. Cas. 5.

ceed. A bill must be accepted, in order to bind the *drawee*.— This is either by writing on it thus :

ACCEPTED.  
JOHN DOE.

Or the *drawee* may accept by parol, as by declaring that he *accepts it*, promising to *accept it*, or pay it, after it is drawn ; and if he promise to accept, *even before it be drawn*, and the payee knows of such promise, and has given credit to it, this shall be a binding acceptance ; though it would be otherwise, in the last instance, if such promise be unknown to the payee, or he has given no credit to it. (x) And when a bill is presented, a promise to accept on condition, as upon the arrival of a ship, will become an absolute acceptance, on the condition being fulfilled. (x) On its being accepted, it then becomes a promise to the payee, to pay him the money ordered by it, the same as a promissory note, and even though the drawer's name be forged, it will be binding in favour of an innocent payee or indorsee ; for the drawee is presumed to know the hand writing of the drawer, and it is his own fault, if he mistake it. (y)

The form of a *promissory note*, is as follows :

\$50

SARATOGA SPRINGS, September 1, 1819.

I PROMISE TO PAY JAMES JACKSON, OR ORDER (or "bearer," or you may omit the words, "order," or "bearer," if you wish to prevent its being negotiable,) FIFTY DOLLARS, THIRTY DAYS AFTER DATE, (or "on demand," or omitting any mention of time, in which case it is deemed payable, the same as if on demand,) FOR VALUE RECEIVED.

RICHARD ROE.

Here, the one to whom payable, JAMES JACKSON, still continues to be called the *payee*, but the one who is bound to make payment, is neither a *drawee* nor *acceptor*, though his liability to JACKSON, is the same, as though instead of giving him a note, he had accepted an *order* or bill of exchange in his favour.— But in this case, the signer of the note ROE, is called the *maker* ; and if the note be negotiable, and JACKSON indorses it to STILES, JACKSON is again both *payee* and *indorser*, the same as on the bill, and STILES an *indorsee*, and the same characters of *first*, and *second indorsers*, and *indorsees*, may be thus created to

(10) 15 John. 6, 10 id. 207, 3 Mass. T. R. 1, 4 Campl. Rep. 393. Chipman's Rep. 42. 2 Wheaton's Rep. 16.

(3) 4 Campl. Rep. 393. (2) 1 Binney's Rep. 27.

an unlimited extent, as in the case mentioned of a bill ; and the relative obligations of the parties are as nearly similar, as the shape of the instruments.

Inland bills derived their quality of negotiability, or sale from one to another, from the *common law* ; and promissory notes are placed on the same footing, in this respect, by our statute. (z)

Though it is always safe and convenient, to date these instruments, it is not essential ; and where they have *no date*, all computations of time, when necessary to be inquired into, will be made from the day they issued ; and, if a bill or note be payable two months after date, and no date be expressed, the court will intend it to be payable two months after the day, on which it was made. (a) It ought to specify, clearly, to whom payable ; and where two persons are of the same name, it is better to distinguish them by their place of residence, or in some other way, as *senior, junior, elder, or younger* ; but where there was A, the father, and A, the son, a bill or note payable to A, generally, was holden, *prima facie*, payable to A, the father, and not A, the son ; but the son having possession of the instrument, may recover, in his own name. (b) They may be drawn, payable to *bearer*, generally, without *any name*, and be negotiated the same as if payable to A, or *bearer* ; and if payable to a *fictitious person*, or order, it is in effect payable to *bearer*, and may be declared on, as such, against all persons, having a knowledge that the *payee* is fictitious ; (c) and indeed, if the name of the *payee* be left blank, the *holder* may insert his own name, as *payee*. (d) It is not essential to these instruments, that they should be payable to *order*, or *bearer*, though without this they are not negotiable ; (e) but this distinction is important only for the ease of declaring ; for in declaring upon other contracts, you must state a consideration, but these instruments import a consideration, the same as a specialty, and all you are bound to do, is, to set them forth according to their legal effect.

These instruments must be, for the payment of *money, only* ; and if payable in *goods*, or in any thing else, besides *money*, they are *not bills or notes*, but a mere contract, binding to be sure, but not negotiable, nor can they be declared on, as bills of exchange, or promissory notes, or in any other way treated

(z) 1 N. R. L. 151.

(a) 3 Bos. & Pull. 173.

(b) 1 Starkie's Rep. 106.

(c) Vid. cases cited, Chitty on Bills, Brookfield ed. 70.

(d) 2 Maule & Selw. 90, 5 Taunt. Rep. 529, S. P.

(e) Vid. cases cited in Chitty on bills, Brookfield ed. 72. 9 John. 217. 14 John. 238. 3 Caines, 137.

as such ; (f) so, if payable in *foreign bills*, (g) even though made payable to *bearer or order* ; (h) but a bill or note may be payable in *New-York bills*, or *specie*. (i) They must, not only be for the payment of money, but they must be payable absolutely, and without any kind of condition ; nor can they be made payable out of any particular fund. but must absolutely bind the person of the maker or acceptor to pay ; thus, an instrument, promising to pay money, " provided I S shall not pay it ;" or " within so many days after the plaintiff shall marry," or to pay " out of the defendant's pension," or " out of money when received" and the like, cannot be treated as a bill or note ; (j) and so, if a *condition upon*, or *fund*, out of which it is payable, be indorsed upon a bill or note, valid upon the face of it, this is the same as if contained in the body of the instrument ; (k) but a promise to pay one hundred and twenty-five dollars, in such manner, and proportion, at such time and place, as the promisee should require, is a good promissory note within the statute ; (l) so, to pay on a day certain, or, *when the promisee completes a building* ; (m) and so, though there be an indorsement, that the note is to be delivered to the payee, in consideration of a judgment, to be assigned by the payee. (n) And if a note or bill be conditional, depending on an *event*, which must happen, as the death of a man, or refer to a certain *fund*, merely as a direction how the drawee, or maker is to reimburse himself, without making the payment depend upon such fund, this will not destroy its character. (Vide Chitty on bills, Brookfield ed. 57, 8, 9.)

No particular form of promise is necessary, and any words which import an absolute engagement to pay, are sufficient ; as a promise to *deliver money* ; that the *payee shall receive money* to be *accountable* ; or *responsible*, for money ; so, these words : " borrowed of I S fifty pounds, which I promise *never* to pay : " in this case, the word *never* may be rejected as surplusage ; and a bill directed thus, " at JOHN DOE," instead of " to JOHN DOE," may be declared on, as a bill, directed in the ordinary form. (o) And where the payee is described, as the *agent of a manufacturing company*, he may, notwithstanding, have an action in his own name. (p) It has been determined in Massachusetts, that where one signs a note as agent, but has in fact no authority,

(f) id. 54. 2 Mass. Rep. 524.

(g) 4 Mass. Rep. 245.

(h) id. 6 Mass. Rep. 182. 7 id. 448.

(i) 9 John. 120.

(j) Vid. cases cited in Chitty on bills, Brookfield ed. 54, 5. 15 Mass. Rep. 387.

(k) 4 Campb. 127. 4 Maule & Selw. 25. 2 Campb. 205.

(l) 9 John. 217. 14 id. 238.

(m) 7 Mass. Rep. 240.

(n) 8 John. 485.

(o) Vid. cases cited in Chitty on bills, Brookfield ed. 53, 4.

(p) 8 Mass. Rep. 163.



the remedy against him should be, not as a principal, in the contract, but in an action on the case for the deceit ;(q) but by the determinations in this state, he may be sued as maker.(r) I indorse a note or bill thus : " For value received, I undertake to pay the money within mentioned, to" (the payee) I am liable, the same as on an original promissory note.(s)

These instruments take effect, only from the time of the delivery, without regard to their date ;(t) though the law will intend they were delivered, at the date, till the contrary be shown.

Whoever has the legal property of these instruments, is called the *holder* ; and when drawn in a particular form, they are transferrable from hand to hand, by certain ceremonies, the same as a *chattel* in possession. But, in order to give them this transferrable quality, they must, in general, contain the words, *or order, or bearer*, or some other words, authorizing the payee to assign ; otherwise, they remain, in this respect, upon the footing of any other *chose* in action ;(u) or, they may be negotiated, if payable to the order of A.(v) But it is not necessary, in order to their validity, or negotiability, that they should contain the words " for value received," or any words tantamount to these ;(w) nor are these words material in an *indorsement* ; and if *alleged*, need not be *proved*.(x)

They may be payable, just as the parties agree, so many days, months or years, *after date*, or *after sight* ; or they may be payable, *on sight*, or *on demand*, or on a particular day mentioned, or, indeed without mentioning any time, in which last case, they are payable immediately *on demand*, the same as if expressly payable on demand.(y) And the time of payment, can in no case be altered, by *parol* evidence.(z) And a separate written agreement, not to demand payment, till after due, is not a part of the contract, but *only the subject of a cross action*, if violated.(a)

I say, at the bottom of a note " I acknowledge myself bound, as surety, for the payment of the above note," and sign it : this is an original undertaking, and I am *jointly* and *severally* holden, with the maker ;(b) so, on a note drawn thus : " I promise to

(q) 11 Mass. Rep. 97.

(r) 13 John. 307.

(s) 9 Mass. Rep. 314.

(t) 2 John. 300.

(u) Vid. Chitty on bills, Brookfield ed. 104, 5, 6.

(v) Vid. id. 58, Boston ed.

(w) id. 60, 61.

(x) id.

(y) Vid. id. Brookfield ed. 211. 8 John. 189. id. 374.

(z) 8 John. 189.

(a) 4 Mass. Rep. 414.

(b) 5 Mass. Rep. 358.

pay, &c." and signed by *two persons*, is a *joint and several* note. (c)

A blank indorsement, on a blank piece of paper, made with intent to give credit to another, authorizes him to write a note on the other side, binding upon the indorser for any amount. (d)

Though a note, or bill, be drawn payable to one in a *wrong* name, he may sue in his *right* name, and shew the mistake; (e) and altering these instruments, so as to make them payable at a particular place, will not vitiate them. (f)

But altering them in a *material* part, as in date, or sum, whether by a party, or a stranger, renders them void, if done without the consent of all parties concerned; though not so, of a part wholly immaterial, or by correcting a mistake; (g) or inserting words, which the law itself would supply, as, where the *date* was intended to run, "in the *year* of our Lord," and the word *year* is omitted by mistake, which the party afterwards inserts; (h) but an alteration, so as to retard the time of payment, avoids the instrument, even in the hands of an innocent holder; (i) and even altering the place of payment, discharges the acceptor of a bill, though inserting a place, where none is mentioned, will not have this effect. (j)

Where a note is made, for my accommodation, to be indorsed at the bank; on the bank refusing, it may be discounted by any other person, though he know for what purpose it was made. (k)

An *infant* cannot be a party to a bill, or note, his engagement being void, even, though it be in consideration of necessities furnished, for if allowed to be valid, it would preclude an inquiry into the original consideration, which an infant always has a right to make; (l) but an infant may transfer a note by *indorsement*, so as to vest a property in the holder, though he would not be liable, if sued as *indorser*. (m) And a promise to pay his bill, note, or indorsement, after he comes of age, will bind

(c) 7 Mass. Rep. 58.

(d) 5 Cranch 142, 4 Mass. Rep. 45 & vid. Chitty on bills, Brookfield ed. 114.

(e) 2 Starkie's Rep. 29.

(f) id. 45.

(g) Vid. Chitty on bills, Boston ed. 89, 90. 4 Camp. Rep. 223.

(h) 6 Mass. Rep. 519.

(i) 3 Yeates, 391.

(j) 1 Maule & Selw. 735. 2 Starkie's Rep. 45.

(k) 17 John. 176.

(l) 10 John. 33. 9 Mass. Rep. 62. Vid. Chitty on bills Brookfield ed. 34, 5.

(m) 15 Mass. Rep. 272. Chitty on bills, Brookfield ed. 107, id. 36, 7.

him, on the ground of a prior moral obligation ;(n) and so, if it be drawn, or indorsed by his co-partner, in the name of the firm, he may ratify it, by a promise, on his coming of age.(o)

Nor can a *married woman* be a party to a bill or note, even, though she live apart from her husband, on a separate maintenance, secured by deed ; and, even a promise to pay, after the death of her husband, will be of no avail ; though where a married woman indorsed a note, and the maker afterwards promised payment to the indorsee, it was holden, that it might be presumed, as against the maker, that it was indorsed by her husband's authority ; and where a husband allows his wife to trade, as a *single woman*, or act as his agent, her indorsement, in his name, will bind him.(p)

But a note or bill, payable, or indorsed, to an infant, may be collected by him ;(q) and a note or bill, payable, or indorsed to a married woman, belongs, and is, in legal operation, payable to the husband, and may be negotiated by him, or collected by him.(r) either in his own name *alone*, or, in the name of him and his wife jointly.(s) Where it is made, or indorsed to her, while *sole*, and she afterwards marries, the right of transfer also vests in the husband, he being, by the marriage, entitled to all her personal property ;(t) and, though in the latter case, the husband must in general, sue in his own, and his wife's name *jointly*, yet where the note or bill, thus holden by the wife while *sole*, falls due, *after* the inter-marriage, he may sue in his own name *alone*.(u)

Except in the instance of an indorsement by a married woman, it seems, that though a bill or note be drawn, indorsed or accepted, by a person incapable of binding himself, it will nevertheless be valid, against all other competent parties thereto. Thus, we have just seen, that it is no defence for the maker, or acceptor, at the suit of the holder, that an infant indorsed the bill or note ; and, though this defence might be available, against the indorsement of a married woman, yet the holder has a right to sue any party, who became so between her and himself.(v)

(n) Vid. Chitty on bills, Brookfield ed. 34, 5.

(o) 14 Mass. Rep. 457.

(p) Vid. Chitty on bills, Brookfield ed. 35, 6, & 108, 9.

(q) id. 35.

(r) id. 103.

(s) 2 Maule & Selw. 393.

(t) Vid. Chitty on bills, Brookfield ed. 103.

(u) 1 Barnwell & Alderson's Rep. 218.

(v) Vid. Chitty on bills, Brookfield ed. 36, 7.

## 2. OF THE MANNER, &c. IN WHICH THESE INSTRUMENTS ARE NEGOTIATED.

This is, by indorsement, if payable to *order*; and either by delivery, or indorsement, if payable to *bearer*, or payable to order, and indorsed in blank. Unless there be these, or other equivalent words of negotiability, the bill or note cannot be transferred; though the indorser, if it be not negotiable, will be liable as in other cases, as between him and his indorsee.<sup>(w)</sup> But, where a note is payable to B, or order, if A indorse it to C, without B's first indorsing it, A is not liable as indorser.<sup>(x)</sup>

The payee must make the first indorsement, or other transfer; if he be *dead*, his executor or administrator; if *insolvent*, his assignees may transfer; and, if there be several persons holders, and they are partners, either may indorse;<sup>(y)</sup> though if not in partnership, they must all join in the transfer;<sup>(z)</sup> nor can one partner, *alone* indorse several after the dissolution of the partnership; and if a bill or note, be made payable to A, *for the use of B*, A is the proper indorser, and not B;<sup>(a)</sup> and a president of a bank may indorse a bill or note, pursuant to a vote of the directors.<sup>(b)</sup>

The time of transfer may be either before, or after acceptance of a bill; or, in case of a bill or note, it may be at any time, either before or after they fall due.<sup>(c)</sup> But, after a bill or note has once fallen due, and been paid, it cannot be transferred so as to affect any party to it, except the one transferring it; as where the drawer pays the bill, and afterwards indorses it, the indorsee cannot have an action against the acceptor;<sup>(d)</sup> therefore, where an indorser, or drawer, pays the bill or note, their action against the acceptor, maker, or prior indorser, for the money so paid, must be in their own name, or in the name of a prior party.<sup>(e)</sup> But, if an indorser pay it, he or his assignee in his name, may maintain an action upon it, against any of the prior parties.<sup>(f)</sup> And the indorsee may sue the indorser of such paid note, or use his name, in the proper form of action, to recover of the other parties liable.<sup>(g)</sup>—

(w) Vid. Chitty on bills, Brookfield ed. 105.

(x) 14 Mass. Rep. 279.

(y) Vid. Chitty on bills, Brookfield ed. 107 to 114.

(z) id. 114.

(a) id.

(b) 11 Mass. Rep. 34.

(c) Vid. Chitty on bills, Brookfield ed. 114 to 118.

(d) id. 118. 3 Mass. Rep. 558. 5 id. 509. 8 id. 465.

(e) id.

(f) 3 Mass. Rep. 556. 5 id. 509. 8 id. 465.

(g) 8 Mass. Rep. 465.



But if paid *before due*, it is, notwithstanding, valid in the hands of a *bona fide* holder, against all the parties to it ;(h) and indeed, a payment in order to destroy the negotiability of a bill or note, must be a payment by, or in behalf, of the *acceptor* or *maker* ;(i) and, though paid by a *drawer*, or *indorser*, as parties, still it may again be put into circulation, the same as a new instrument.(j)

We have already mentioned, that a bill or note, payable to a certain person or *bearer*, or to *bearer* generally, or originally payable to order, and indorsed in blank, (i. e. merely by writing the indorser's name on the back,) is, in legal operation, assignable *afterwards*, by indorsement, or mere delivery ; but a bill or note, payable to the *order* of a certain person, or to that person, or *order*, or *assigns*, or to the *drawer's order*, is, in general, transferrable in the first instance, only by indorsement ; though afterwards, it is transferrable also by delivery, provided the first indorsement was in blank ; and the transfer by mere delivery of a bill or note, payable to a fictitious payee, or *order*, is valid against all the parties to the instrument, acquainted with that fact ;(k) but a note in this form : " due to the *bearer*, one dollar which I promise to pay to A, or *order*," is a note payable to *order*, and must be transferred by indorsement.(l) A note may be negotiated here, though made in a state where it is not negotiable by law.(m)

No particular form of words is necessary, in an indorsement, either to pass a property in the bill or note, or to enable the holder to collect as the agent of the indorser ;(n) and the words, " I guarantee the payment of this note, within six months," would make the indorser liable, as upon a common indorsement.(o) The indorser's name may be written on the back, or any other part of the bill, by himself, or some person duly authorized by him ; but in the latter case, the agent should endorse expressly as agent as " A, by B, his agent," or merely write the name of his principal, or the indorsement will be inoperative.(p) In the commercial world, suppose I. S. to be

(h) 3 Campl. Rep. 194.

(i) 3 Maule & Selw. Rep. 95.

(j) id.

(k) Vid. Chitty on bills, Brookfield ed. 119.

(l) 1 John. 143.

(m) 1 John. cas. 139.

(n) Vid. Chitty on bills, Brookfield ed. 119, 20.

(o) 12 Mass. Rep. 14.

(p) Vid. Chitty on bills, Brookfield ed. 119, 20.

Doe's agent, he would generally sign Doe's bills, notes and indorsements thus : " Per procuration of I. S.

JOHN DOE."

Indorsements are made, either in *blank*, in *full*, or *restrictive*: The indorsement in blank, is by merely writing the indorser's name on the back of the bill, or note, which the indorsee may, at any time, and even on the trial, fill up, by writing over it, " pay the contents," or, " pay the contents to the indorsee, (naming him,) or *order*," or " *bearer*," or other words of like import, which if he omits to do, the action may still be brought in the name of the indorser, and the indorsement struck out on the trial. A blank indorsement *also*, makes the bill or note transferrable by mere delivery, as if it had been payable to *bearer*.<sup>(q)</sup> and where a bill was indorsed in blank, and two plaintiffs sued upon it, as indorsees *jointly*, it was holden, that they were not obliged to prove, either that they received the bill so indorsed, as partners, or that it was indorsed to them *jointly*.<sup>(r)</sup>

An *indorsement in full*, is where the indorser fills up the blank indorsement himself, by expressing, in *whose favour* he makes the indorsement ; as, " pay the contents to A, or *order*," or to that effect. If this indorsement be made payable to order, the bill or note can be negotiated farther, by the indorsee only ; but he can make it transferrable by delivery, by indorsing it in blank. An indorsement in full, is, by itself, a transfer to the indorsee, and the indorsement cannot be stricken out, or altered without the consent of the parties to it, nor can the bill or note be sued in the name of the indorser, while the indorsement remains in force.<sup>(1)</sup> It may be farther negotiated by the indorsee, though the words, *or order*, be omitted in this indorsement ; for a bill or note negotiable in its origin, can only be restrained by words of express restriction.<sup>(s)</sup>

An indorsement in blank, may, or may not be filled up at the election of the indorsee, but an indorsement in full, transfers the interest of the payee to the person named in the indorsement, and nothing but cancelling the endorsement, or the indorsee's indorsing it again, would divest him of the legal title. 15 John. 349, per Spencer, J.

<sup>(q)</sup> id. & vid. 2 Dall. 396.

<sup>(r)</sup> 1 Starkie's Rep. 446.

<sup>(s)</sup> Vid. Chitty on bills, Brookfield ed. 122.

<sup>(1)</sup> But it has been decided in Pennsylvania, that a special indorsement may be stricken out, the same as a general one. 1 Dall. Rep. 193. But of this, Quere ? 4 John. Rep. 27, 15 John. 247.

A *restrictive indorsement*, restrains the payment of the bill or note, to the endorsee *only*, as by saying, "Pay the contents to A *only*," or "to A for my use;" and the indorsee cannot, in such case, negotiate the instrument any farther; but stating in the indorsement, the consideration upon which the bill or note was given, is not, for that reason, a restrictive indorsement; but saying, "the within must be credited to J. P." (the indorsee,) or any other words, clearly demonstrating an intention to make a limited indorsement, will prevent the farther transfer of the instrument.<sup>(t)</sup>

A bill, after acceptance, or a note, can in no case be transferred in any way, for *only a part* of the sum due; for a personal contract cannot be apportioned; and such a transfer would pass *no interest* to the holder claiming under it, as against the acceptor or maker; but when part of the bill or note has been paid, it may be indorsed over for the residue; and if a bill be indorsed, before acceptance, for part, the drawee may, by accepting, render himself liable to two actions;<sup>(u)</sup> and, I should suppose, that an indorsement for a part of the sum due, though void as an indorsement, might yet operate as an original bill, drawn by the *indorser*. A bill or note, valid in its concoction, may be sold and transferred *in whole*, for a consideration less than its nominal amount, and the indorser is liable in an action, for the sum only which he actually receives, with interest.<sup>(v)</sup>

OF THE CONSIDERATION OF A BILL OR NOTE, AND HOW, AND WHEN, IT MAY BE INQUIRED INTO. AND OF THE REMEDY ON A LOST BILL OR NOTE.

Every bill of exchange, or promissory note, *import* a consideration, the same as a specialty, unless the contrary appear in the instrument itself;<sup>(w)</sup> and it is not necessary, for the party suing upon them, either to state a consideration in his declaration, or to prove one upon the trial, in the first instance.<sup>(x)</sup> But it is otherwise of a note not within the statute, as *to pay in stock*, or upon condition, &c. though, where the words, "For value received," are in such a note, you need not alledge, nor prove, the particular *consideration*; for such acknowledgment of value, generally, is good. Yet, upon such a note, if you *do* alledge, in declaring upon it, the *particular* consideration, upon which it was given, you must then make it out in proof, and cannot rely upon the general words.<sup>(y)</sup> And, even upon a bill of exchange,

(t) id. 123.

(u) id. 124.

(v) 13 John. 52, 15 John. 44.

(w) 9 John. 217.

(x) Vid. Chitty on bills, Brookfield ed. 74, 5.

(y) Vid. 3 Caines 286. 7 John. 321, 19 id. 418.

or a promissory note, properly so called, the consideration upon which it was given, is, with certain qualifications, a subject of inquiry upon the trial, and if impeached by the defendant, the plaintiff may fail, in *whole*, or in *part*, of recovering the sum which he seeks to obtain.

As between the *drawer* and *acceptor*, the *drawer* and the *payee*, and his agent, and the *indorsee* and his *immediate indorser*, the *total*, or *partial* want of consideration for the bill, at its issuing, (z) the *total* failure of such consideration, after its issuing, or the fraud, or illegality of such consideration, may be shown as a defence to the action; and so, as between the *maker* and *payee*, and the *indorsee* and his *immediate indorser*, of a promissory note. (a) And, if the payee indorse the bill or note to A, in trust for himself, or for some relation of the payee, it will be the same, as if the original parties were before the court. (b)—For instance, I give a note as administrator, “for value received by my intestate;” this note would be void on its face, in any holder’s hands; because it would carry notice with itself, to whomsoever should receive it, that it was given without consideration. (c) If a note is given for a particular purpose, which fails, or is violated in its negotiation; (d) or, is given by bail, in consideration of the judgment against his principal, which is afterwards reversed on writ of error, or *certiorari* brought; (e) or given for a pretended title to lands, the grantor being out of possession, such sale being void and illegal, under our statute, (f) to prevent *champerty* and *maintenance*; or, in this, case for *Susquehannah* disputed lands; (g) or for lands previously sold under a judgment, or goods to which the vendor has no title, &c. (h) to induce the withdrawing opposition, to an *insolvent’s* discharge; (i) for a conveyance of land, void from a defect in form; (m) for the consideration, on the purchase of a patent right fraudulently obtained; (n) for a chattel, fraudulently represented by the grantor to be of value, when it is worth nothing; (o) and a breach of warranty of the goods, for which a note or bill is given, destroys it, if the goods be returned, or refused acceptance, on the vendee’s offering to return them. (p).

(z) 1 Sergeant & Rawle’s Rep. 32. 17 John. 301. The doctrine of Livingston, J. 2 Caines, 247, overruled.

(a) Vid. Chitty on bills, Brookfield ed. 77.

(b) 4 Mass. Rep. 370. & id. 543. 3 Caines, 213.

(c) 8 John. 120.

(d) 10 John. 198.

(e) 3 John. 465.

(f) 1 N. R. l. 172.

(g) 3 Caines, 279.

(h) 11 John. 50.

(i) 12 John. 306.

(m) 7 Mass. Rep. 14.

(n) 8 Mass. Rep. 46.

(o) 15 John. 236.

(p) 2 Taunt. Rep. 2.



But although it is agreed, that the *original partial insufficiency* of the consideration of a bill or note, may, in the above cases, be shown as a defence, (q) yet, as the decisions now stand, in England, a *partial failure of consideration* is no defence; (r) and, in a late case *there*, where the failure of consideration was nearly total, the king's bench refused to receive *this* as a defence, but turned the defendant round to his *cross remedy*. (s) In Massachusetts, a different doctrine appears to be holden; *there*, a *partial failure of consideration*, would entitle the defendant to a *deduction* from the amount claimed by the plaintiff. (t) This question, I believe, yet remains to be passed upon in our own state, and is certainly not without its difficulties; though, perhaps it may not be so easy to perceive, in the clear and emphatic light with which lord Ellenborough expresses himself, the difference between *deducting* from the security for a *partial want* or a *partial failure of consideration*; (u) and the opinion of the king's bench, delivered by the same judge, appears to have passed without adverting to a single authority. (v) Whether a promissory note, given by the maker to the payee, as a gift, and without consideration, can be enforced, appears also to remain a question in England; (w) but it is settled in this state, that it cannot be enforced, as between the original parties. (1) But, whenever the holder has given a full value for the bill or note, before it falls due, although at the time of receiving it, he knew there was no consideration, as between the *drawer* and *drawee* or *acceptor* of a bill, or the *maker* and *payee* of a note, unless he also knows, that the person from whom he received it, acted fraudulently, such want of consideration will be no defence as to him; for nothing is more usual, than to draw, or indorse a bill, or make, or indorse, a note, merely for the accommodation of a friend, and as a substitute for a loan of money, (which are called *accommodation bills*, *notes* or *indorsements*;) though it would be otherwise, if the holder gave *no value* for an accommodation, or other bill or note, without consideration, or, where he takes it with notice, that it was indorsed for the accommodation of the makers, who had become insolvent and were *forbidden* by the indorser to negotiate it. (x) And so, I should conceive, if, in such case, he took the bill or note at less than its nominal value, the defendant might, though an acceptor, or maker, confine his recovery to the sum which he paid, with interest; and such is clearly the law as between the *indorsee*

(q) Vid. Chitty on bills, Brookfield ed. 77.

(r) 1 Campb. Rep. 40. N. 2 id. 346.

(s) 14 East, 486.

(t) 10 Mass. Rep. 415.

(u) 2 Campb. Rep. 346.

(v) 14 East, 486.

(w) 2 Ves. Jun. 115, 6, 7—121.

(1) 7 John. 26.

(x) Vid. Chitty on bills, Brookfield ed. 75. 15 John. 270.

(y) 1 Esp. Rep. 261.

and *drawer* of a bill; though where such a bill is drawn, for money really due, from the drawee to the drawer, an indorsee purchasing for less than the amount, may recover for the whole, and hold the *overplus* to the use of the *indorser*. (y)

But to illustrate the above doctrine, still farther:—Suppose *John Doe*, the *drawee*, on the bill of which we have given the form, should, after having accepted it, refuse payment to *James Jackson*, the *payee*; and *Richard Roe*, the *drawer*, should be obliged to pay his own bill himself, and then bring his action against *John Doe*, the *acceptor*; *Doe* might show in his defence, either that he owed *Roe* nothing, and had received nothing from him, as a consideration for accepting the bill, and, therefore, was not bound to pay it, or that he accepted the bill to hush up a prosecution for stealing goods, or some other purpose, which is illegal, or that the consideration of the bill had failed altogether, or that there never was a full consideration for his acceptance, but only for a part of the amount, for which the bill was drawn, and by the latter defence, reduce the recovery; and so, if *Jackson*, the *payee*, having failed to collect the bill of *Doe*, the *acceptor*, should turn round, and sue *Roe* the *drawer*, he might, in the same manner, show a want of insufficiency, or illegality of consideration, in order to defeat *Jackson*, or reduce his damages; and *Jackson* might show the same, as between himself and *John Stiles*, his *immediate indorsee*, if the latter should sue *Jackson*, upon his indorsement; or he might, in his defence, show, that the indorsement was conditional, as that *Stiles* should first sue the *acceptor* to judgment and execution, and that, only in the event of his failing to collect there, should he come back against the *indorser* (z) and, with regard to the note, if *Roe*, the *maker*, is sued by *Jackson*, the *payee*, *Roe* can show the same things, as between him and *Jackson*, either to defeat or reduce the recovery; and so, if *Stiles*, the *indorsee*, should sue *Jackson*, the *indorser*, the same defence would come in play, as between the *indorsee* and *indorser* of the note; and the reason is, because there is a privity between all these parties, and they know, or are presumed to know, whether the bill, note or indorsement, are fair and honest, and bottomed upon good consideration.—But a different rule prevails, with regard to the other parties to these instruments; for many times, they are utter strangers to the transactions, out of which the bill, note, or indorsement, upon which they claim, arose. They are hence called *innocent*, or *bona fide* holders; and the law will sustain their claims, how-

(y) 1 Esp. Rep. 261.

(z) 1 Connecticut Rep. New Series, 387.

(a) Vid. Chitty on bills, Brookfield ed. 85, 6.

(b) 5 Mass. Rep. 334, & vid. 1 Caines 258. 3 Day's Rep. 311. 1 John, 319.

ever viciously other parties may have acted, or whatever objections of *consideration* may arise: Thus, I may buy a bill or note at its full value, or at what it is worth, taking into consideration the solvency, or insolvency, of the parties who appear upon it, before it is due, being a *stranger* to the transaction, out of which it grew, and take an indorsement; or, if it is payable to *bearer*, or to *order*, and is indorsed, *in blank*, content myself with a mere *delivery* from the holder, and if it turns out that this bill or note was issued or given, to compound and settle a felony, or some other crime; or, that it is destitute of consideration, &c. or that the indorsement to my indorser, or the one of whom I received it, was vicious upon any of these grounds, I ought not to be affected by this matter, and I can recover, though, as between other parties, the contract or indorsement may be void. (a) And where a man is thus, an innocent holder of paper, the law is sedulous to protect him, and it will, unless he was an original party, always intend him to be a *bona fide* holder, in the fair course of trade, until the contrary is shown by the defendant; (b) thus, where I sue as indorsee, either the maker, acceptor, or any of the indorsers, on proving the bill or note, and indorsement, indorsements, or other transfer to me, (and if payable, or indorsed in blank, my possession is evidence of ownership,) the law presumes, that I came by the bill or note in the fair course of trade, before it was due, paying therefor a valuable consideration (c) And though an indorser, or other disinterested party, may be a witness to show when the bill or note was transferred to me, or indeed, any fact to show that it is discharged, since it was issued, by payment or otherwise; yet, no one, whose name appears upon the instrument, is admissible as a witness, to show it void in its creation, for any cause. (d) But the hands of such holder should be perfectly clean, for, if it can be shown by proper evidence, that he gave nothing, or but a very slight consideration for his paper, so as to make the purchase merely colourable; or that he bought it with notice of the circumstances, which go to impeach it (unless they be merely want of consideration,) (e) or took it after it was due, even if he gave a full consideration, and *knew nothing* of the objections against it; (f) in all these cases, he stands in the same situation, and is liable to have his action defended upon the same grounds as if he were an *original party* to the instrument. Thus,

(a) Vid. Chitty on bills, Brookfield ed. 85, 6.

(b) 5 Mass. Rep. 334, & vid. 1 Caines, 258. 3 Day's Rep. 311. 1 John. 319.

(c) id.

(d) Vid. *post.* chap. Evidence. 15 John. 270.

(e) Vid. Chitty on bills, Brookfield ed. 83, 4.

(f) id. & vid. the numerous cases in S. C. cited, John. Dig. tit. Bills, &c. III. (c) pl. 39. 1 Mass. Rep. 2.

if a note is indorsed to me by *Jackson*, against *Roe*, and I sue *Roe* upon it, he can show, 1. Either that I paid nothing for it, or 2. That though I did pay, yet I knew, or was informed, at the time, of the defence which he had against it; (*g*) or, 3. That I bought it when it was over due, (*h*) and then, in either of these cases, he can show, either that he had a set off against *Jackson*, to the whole, or a part of the amount, for which the note was given, or that he had paid the note before the transfer; or that he gave the note without any value received, or without a full value received, (except where it is sold for a fair consideration, before due, though such sale be *with notice*;) or that the consideration of the note had wholly failed, or was *illegal*, or *fraudulent*; (*i*) and thus defeat my recovery, either *wholly*, or *partially*, according to the nature of the defence; but, if my indorser could maintain an action, he having received the note before due, in the fair course of trade, I can do the same, as indorsee, though he indorse it to me after it falls due; (*j*) and so, I suppose, if I receive it in any other mode of transfer, from him. Even where the maker's name is forged, yet the indorser is holden. (*l*)

In a few cases, indeed, where our statute has declared a bill or note void, as where it is issued contrary to the act for preventing usury; (*k*) or the act to prevent excessive and deceitful gaming; (*l*) or the act to prevent horse racing, &c. (*m*) In these, and the like cases, it is void, to all intents and purposes, as to all parties, even a *bona fide* indorsee, though he may have purchased it under the most favourable circumstances; and where a bill or note is issued for the purpose of raising money, and transferred at a discount, greater than the legal interest, it is *usurious* and void; (*n*) but, if such bill or note be *valid* in its concoction, and would bind as between the original parties, no matter at how great a discount, it may be sold, and indorsed, nor how ample the ability of the parties to pay; though it may be *usurious* as between the parties immediately concerned, in discounting and negotiating it, yet such transfer is *valid*, as against the other parties, the acceptor, or maker, for instance; and such *usurious* holder may sue, and maintain an action in his own name. (*o*) But the contrary has been decided in Connecticut. (*p*)

(*g*) 13 John. 238, 15 John. 270.

4 Dall. 371, 4 B. money, 366.

(*h*) 5 Mass. Rep. 334, 3 Day's Rep. 311.

(*i*) 15 John. 230.

(*j*) 1 Campb. Rep. 383.

(*l*) 3 Day's Rep. 12.

(*k*) 1 N. R. L. 64.

(*l*) id. 152.

(*m*) id. 222.

(*n*) 15 John. 44.

(*o*) 15 John. 44.

(*p*) 2 Connecticut Rep. New Series, 175.



If a bill or note, payable *on demand*, be transferred, such a length of time after its date, as to raise, from this circumstance, or this and other circumstances combined, a presumption, that it must have been presented and not paid, or otherwise dishonoured, the acceptor or maker is entitled to his defence, in the same manner as if it had been payable at a day *certain*, and transferred when *over due*.(q) But there is no precise time, in which such a bill or note, is to be *deemed dishonoured*; but it must depend on the circumstances of the case, and the situation of the parties; and where there were no peculiar circumstances, it was holden that a transfer *two and a half months* after date, would let in the defence; and various times have been adjudged sufficient, to let in this defence; as *two years, eighteen months*, and so down to *two and a half months*, and in one case, *five months*, the note having several indorsements on it, was holden insufficient, and the defendant must in this, as in other cases, show the time of the transfer, or the law will intend that it was soon after the instrument falls due.(r)

In an action by an *indorsee*, against the *drawer*, it is a good defence, that the plaintiff holds the bill, without consideration, merely as the *agent* of the *payees*, for collection, upon a general indorsement, and that the latter have requested the defendant, not to pay the plaintiff.(s) And the same defence may be set up, by a *second indorser* of a note, in an action by an *indorsee* against him, (i. e.) that the plaintiff holds it, merely, as the *agent* of the *payee*, though no notice not to pay to him be proved;(t) but an *indorser*, for the accommodation of the *pavee* is liable, although the circumstance be fully known to the *indorsee*, or the note be transferred after it was over due, where there is no fraud.(u)

An action can, in general, be sustained on a bill or note, though it be *lost*, but not so, if it were indorsed, or otherwise transferred, even though transferred after falling due,(v) and an indemnity be tendered against it.(w) The proper remedy, however, in such case is, generally, in the court of chancery, for lack of the necessary proof at law.(x) A plaintiff may, however, under the late decisions, be a witness *himself*, in the courts of law, to prove the loss, but nothing more.(y) An action cannot be maintained on one part of a bill cut in two. to be sent by post, one half being lost.(3 Campb. Rep. 324.) If an action be

(q) 7 John. 70.

(r) Vid. cases collected in John. Dig. tit. bills, &amp;c. III (c) pl. 43, 4, 5, 6, 7, 8, 9.

(s) 6 Mass. Rep. 430.

(t) 10 John. 224.

(u) 7 John. 361.

(v) 2 Campb. Rep. 211. 10 John.

104.

(w) id. 214, n.

(x) Vid. 1 Ves. 341. 5 Ves. Jun. 338. 6 id. 812.

(y) Vid. *post*. chap. *evidence*.

brought on a negotiable note, which is lost, the law will not intend that it has been negotiated, but it lies with the defendant to show this fact in his defence. (10 John. 104) But if the holder of a bill or note, negotiable by delivery, lose it in any way, as by robbery, theft, or accident, and it is transferred before due, for valuable consideration, the purchaser may recover on it, unless he knew of the loss; and if it be paid by the acceptor, or maker, after it is due, even to one who is not a *bona fide* holder, such payment is good, unless the acceptor or maker had notice of the loss. (Vid. Chitty on bills, Brookfield ed. 129, 30.)

I indorse a note, payable to me the first of May, 1819, as follows, "Pay the contents to I. S. the first of April, 1819;" I am bound by the indorsement, and may be sued upon at any time, after the first of April, and cannot defend myself, on the ground, that the note has not fallen due.

The effect of a transfer by delivery, as it respects the defence which may be set up, is the same as a transfer by indorsement; but it does not, *of itself*, create any obligation in the person delivering it, as an indorsement does. (2) The circumstances, under which he is liable for the consideration of the transfer, will be noticed towards the close of this head, when we come to treat of, how far a bill or note will operate as payment of a debt. But the law always implies a *warranty*, in such transfer, that the bill or note is *not forged*, even though it be taken at the risque of the one receiving it. (a) It is not necessary for the bearer, in order to sustain his action, to show that he gave any thing for the bill or note, *unless* the defendant, in the first place, show some circumstance to induce a suspicion, that all is not right with the plaintiff; as that the bill or note had been lost, or stolen; (b) or, that it was executed under *duress*, and without consideration; (c) or had been once negotiated fraudulently; (d) or fraudulently obtained from the defendant. (e) In such and the like cases, the plaintiff must show, that he came by it in the fair course of trade; and this, even though the bill or note be *indorsed* to him. (f) But in all these cases, the defendant must give the plaintiff reasonable notice of his defence, in order that he may come prepared to repel it, by the necessary proof on his part: (g) and the defendant must accompany such notice with proof of it on the trial; for the mere notice, is not enough to put the plaintiff to any thing beyond the ordinary

(s) Vid. Chitty on bills, Brookfield ed. 127.

(a) 15 John. 249.

(b) Vid. Chitty on bills, Brookfield ed. 75.

(c) 1 Campb. Rep. 100.

(d) 5 Binney's Rep. 469.

(e) 4 Taunt. Rep. 124. 2 Campb. Rep. 571.

(f) 2 Campb. Rep. 574.

(g) 4 Taunt. Rep. 114.

proof, in order to sustain his action.<sup>(h)</sup> The payee or any subsequent holder of a bill or note, payable to bearer, may hold himself by an indorsement, the same as if the instrument had been payable to order.<sup>(i)</sup>

### 3. OF THE RIGHTS AND OBLIGATIONS OF THE PARTIES, TO A BILL OR NOTE.

This relates, 1. *To the drawer, or indorser of a bill, before acceptance.*

2. *To the acceptor of a bill, and maker of a note.*

3. *To the drawer and indorser of a bill, after acceptance, and the indorser of a promissory note, and herein, of the conduct the holder is to pursue, upon non-acceptance, and non-payment, and in giving notice thereof.*

4. *How any of these parties may be discharged.*

5. *How far the receiving a bill or note for a debt, is a payment.*

6. *When a bill or note is evidence, under the money counts.*

1. BY DRAWING AND DELIVERING the bill to the payee, the drawer engages, absolutely and irrevocably, to the payee, and every subsequent holder, that the drawee is capable of binding himself by his acceptance; that, on the bill being duly presented, he will accept it; and that he will pay it, on its becoming due, if demanded in proper time. On failure, in any of these particulars, the drawer will be immediately liable to the holder, whoever that may be, for the amount of the bill.<sup>(j)</sup>—And where acceptance is refused, or the drawee is unable to bind himself by an acceptance, or, for any other cause, there be no acceptance, or it is only partial, conditional, or otherwise limited, on presentment of the bill to the drawee, an action lies against the drawer immediately, without waiting to demand payment from the drawee;<sup>(k)</sup> or waiting for the time, when the bill falls due, if payable at a future day.<sup>(l)</sup> And after the action commenced, though it afterwards be presented for pay-

<sup>(h)</sup> 2 Campb. Rep. 596.

<sup>(i)</sup> 3 John. 439.

<sup>(j)</sup> Vid. Chitty on bills, Brook-  
field ed. 161, 2.

<sup>(k)</sup> id. & 4 John. 144.

<sup>(l)</sup> id. & 3 Mass. Rep. 557. 1

Day's Rep. 11. 3 Mass. Rep. 460.

ment, this will not affect the right of action.<sup>(m)</sup> The drawer is moreover, liable to the drawee, to indemnify him for the money he pays on the bill, if he be not already indebted to the drawer, or otherwise have effects in his hands, belonging to the drawer; and he may have his action for money paid for the drawer, on his paying the bill.<sup>(n)</sup> The liability of the indorser, is the same with that of the drawer; and his indorsement is considered equivalent to the drawing a new bill. The indorser stands, in almost every respect, in the situation of a drawer, except, that he is in no case, liable over to the acceptor.<sup>(o)</sup> But the engagement of either, is in general, condition 1, that is, that the bill shall be presented by the holder to the drawee, for acceptance, at or before the time when it falls due. When it shall be esteemed due, will hereafter be considered, with the mode and time of giving notice thereof, when we come to speak of non payment and notice thereof, the rules as to which apply here. If a bill be payable, at a certain time after sight, it should be presented for acceptance, within a reasonable time after being drawn; in order to determine the time of its being due; but, in other cases, it is not necessary to present it, till due.<sup>(p)</sup> What is meant by a reasonable time, will also be considered hereafter.

OF THE RIGHTS AND OBLIGATIONS OF THE ACCEPTOR OF A BILL, AND THE MAKER OF A NOTE.

2. The acceptor of a bill, or the maker of a note, is liable to pay the money to the payee, or any subsequent holder, on the same becoming due: and is liable to an action, without any demand, except in the cases of a bill or note payable at sight, or at a specified time after sight;<sup>(q)</sup> in which case it must be presented. But in no other case, as between the holder and acceptor of a bill, or the maker of a note, is a demand or presentment necessary, even though it be payable on demand, or at a particular place, if payable at a specified time. The point, whether a demand is necessary, when payable at a certain time and place, on which the Common Pleas,<sup>(r)</sup> and King's Bench, in England,<sup>(s)</sup> were at issue for some time, has been put at

(m) 8 Mass. Rep. 460.

(n) Vid. Chitty on bills, Brockfield ed. 102.

(o) id. 125, 26.

(p) id. 140, 1.

(q) 2 Taunt. Rep. 623.

(r) Vid. 3 Taunt. Rep. 397. 5 Taunt. Rep. 344, & 1 Campb. Rep. 423, 5. 2 id. 498. 4 id. 200, & 13 East, 559. That such presentment or demand is not necessary.

(s) Vid. 3 Campb. Rep. 247. 463. 14 East, 500. 16 id. 110, contra.



rest in this state, by a decision of the Supreme Court settling the rule as I have above stated it; nor is it necessary, though the bill or note be payable *on demand*, at a particular place, to present it there for payment, in order to charge the acceptor or maker; and the case decided in the exchequer chamber, in which the contrary is held. (5 Taunt. Rep. 30) is expressly commented upon, and overruled, by the Supreme Court, in pronouncing the decision I have mentioned. (i) It is no defence for the acceptor, or maker, that the bill or note was not presented or demanded, until long after it became due; or that indulgence has been given to the drawer, payee, indorser, or other parties. However, the holder may discharge him, by express consent, even by parol; but the words must clearly amount to an absolute renunciation of all claim upon the bill; and merely saying, *that the holder will not come upon him for the out*, is not sufficient. (u) But it seems that no consideration is necessary, for such discharge, which makes it an exception in this respect, from the general run of contracts. Even receiving part of the drawer, and taking a promise, on the back of the bill, for the residue, will not discharge the acceptor.— But an agreement to discharge him, on his making an affidavit, that the acceptance is forged, will have that effect; even though the affidavit be false. So, if the acceptor has sustained damage, by the bill not being presented for payment, at the place appointed in it; but an alteration of the bill, or acceptance, in a material part, will avoid it; and where a bill was accepted, for the accommodation of the drawer, and the holder, with a knowledge of this fact, made an agreement with the drawer, to give him time for payment, without the acceptor's consent; it was holden, that he was discharged, (v) on the ground of his being a mere surety of the drawer, and consequently, within the rule of law applicable to that relation, discharged by the holders, thus giving time to his principal. (w) We have seen, that the acceptor or maker may defend himself, on the ground that the holder is a mere agent, having no interest in the bill or note, and that the defendant has notice not to pay him; but it is otherwise, if the plaintiff have any, the *least* interest, though it be merely a lien. (x) The acceptor or maker are also liable for interest; but, though the promise be to pay interest annually, only simple interest, is recoverable. (y) If payable at a day certain, either without interest, or less than the

(i) 17. John. 243, & vid. 8 Mass. Rep. 455, acc. vid. 4 John. 133, acc.

(u) 1 Campb. Rep. 35.

(v) 2 Campb. Rep. 185.

(w) Vid. Chitty on bills, Brookfield ed. 153 to 164.

(x) 6 Mass. Rep. 430.

(y) 3 Mass. Rep. 455.

legal rate of interest, "and if not then paid, with lawful interest till paid;" on default of payment at the day, it draws interest from the date.(z) A separate judgment, against one of two joint makers, is no bar, to an action against both.(a) A tender of payment, at the day and place mentioned in the bill or note, only prevents interest, and the costs of the action, but does not discharge the debt.(b)

A note drawn by one partner, in the name of the firm, though for his private debt, is *prima facie* binding on the firm.(c)

OF THE RIGHTS AND OBLIGATIONS OF THE DRAWER, AND INDORSER OF A BILL AFTER ACCEPTANCE, AND OF THE INDORSER OF A PROMISSORY NOTE, and *her-in, of the conduct which the holder is to pursue, upon non-acceptance and non-payment, and in giving notice thereof.*

3. The engagement of the indorser of a bill, after acceptance, or the indorser of a promissory note, is, that the bill or note shall be paid, on its being duly demanded of the acceptor of the bill, or the maker of the note; and his failing to make payment, according to his engagement.(d) But, neither the indorser, nor drawer, are liable for the costs of a suit, against any of the other parties, without a special promise of indemnity; e) and, if the indorser have received of the indorsee, less than the face of the instrument, the former is liable only for the sum received, with interest; (f) though it is otherwise where the action is against the maker.(g)

Where a promissory note, not negotiable, is indorsed in *blank*, the holder may write over it a guaranty from the indorser, that the note shall be paid.(h) But in a late case, decided by our Supreme Court, the doctrine of the last cases, to the extent above laid down, has been questioned; and, in speaking of the cases decided in 13 John. 175, and in 14 John. 349, they say, "that in these cases, where the plaintiff was allowed to write a guaranty, over the indorser's name, the indorser was, either present, and agreed to guaranty the payment, or it appeared in proof, that he knew the extent of his indorsement to be as alleged. But, that where I agree with you, to buy goods, to be paid for with an indorser, and I draw a note

(z) 14 Mass. Rep. 177.

(a) 6 Cranch, 253.

(b) 17 John. 248.

(c) 13 East. 175.

(d) Vid. Chitry on bills, Brookfield ed. 125, 197.

(e) 9 John. 131.

(f) 13 John. 52. 15 id. 44.

(g) id.

(h) 3 Mass. Rep. 274. 13 John. 175. 14 John. 349.

“ payable to you or order, which I get my friend to indorse, “ without his engaging any farther, than by his mere indorsement ; he is liable, only in the character of a second indorser, “ and is entitled to notice of non-payment, the same as if the “ note had been first indorsed by you, and to all other privileges, incident to the character of an indorser.” And it seems from this case, that a note may be thus indorsed, by a second indorser previous to its being indorsed by the first ; who should afterwards indorse it himself, which then throws the instrument into a proper shape, for suit in the ordinary mode.<sup>(i)</sup>— But still, the doctrine, as laid down in third Mass. Rep. 334, in its application to the circumstances of the case there considered, is not questioned by the Supreme Court, and they admit, that where such a note is indorsed, the indorser intending thereby, to give the maker credit with the payee ; there, the indorser would be liable to the payee, or any subsequent indorsee, even though the ordinary steps to charge him as indorser be not taken ; and the blank indorsement may be filled up, as laid down in Massachusetts, with a *guarranty*, in these words : “ For value received, I undertake to pay the money within mentioned, to E. F.” (the payee.) <sup>(j)</sup>

Where the indorsee brings a suit against the indorser, and another against the maker, and the indorser finally pays off the claim, and settles the suit with the indorsee, but they agree, that the suit brought against the maker, shall nevertheless proceed, for the indorser's benefit, the maker cannot avail himself of these circumstances, to defeat the suit against him.<sup>(k)</sup>

But we have seen, that in general, the engagement of the indorser, like that of the drawer, is conditional ; that the bill or note shall be paid, on its being duly demanded. This demand cannot be made, till the money is due, and it must, in general, be demanded, in order to charge the drawer or indorser, the very day when it falls due ; and hence it becomes material to know, *when* the law adjudges this to be the case. What I shall here notice, with regard to that time, is equally important, in determining the period, when a *bill* must be presented for *acceptance*. When a bill or note is payable on demand, or when no time is mentioned, it is construed to be payable presently, and no days of grace are allowed ;<sup>(l)</sup> but, it is said to be questionable, whether these days are allowed, upon a bill payable at sight, though the better opinion appears to be, that

<sup>(i)</sup> Vid. 17 John. 326. 12 John. 159.

<sup>(k)</sup> 13 John. 353.

<sup>(l)</sup> Vid. Chitty on bills, Brookfield ed. 211

<sup>(j)</sup> Vid. 12 John. 159. 17 id. 326.

they are not. (m) But when a note mentions no time for payment, it is payable as a note on demand, and must be declared on as such. (n) In these cases, then, payment should be demanded, by the holder, within a *reasonable time*, after he receives the bill or note. (o) This must depend on the *distance* of the parties, from each other, the *course* of the post, &c. and this time must also be accommodated to *other business*, and *affairs of life*, with the holder. However, in general, it should, if the parties reside in the same place, be presented for payment, the next morning after received, at farthest; and, if the acceptor, or maker reside at a distance, it should be transmitted for payment, the next post. It is advisable to present it, the day of receiving it, if possible; but the next day for presenting it, or the next post for sending it to be demanded, should not be let slip, unless for some very substantial reason; such perhaps as we shall see hereafter, would excuse the usual notice of non-payment. A *reasonable time* is, however, a mixed question of law, and fact, depending on the above and other circumstances. (p)

When a bill or note is payable at a day certain, as so long after date, after sight, after demand, or on any other particular day, mentioned in the bill or note, it is not payable at the time the words naturally import, but the acceptor or maker, has till the third day after, and *exclusive* of the day expressed, in which to make the payment; and he has the *whole* of this third day, in which to pay, and no action can be brought against him, till the morning of the next day. (q) And this is equally the case, where the bill or note is not negotiable. (r) On this day, and not before, payment should be demanded; and, if demanded, before such presentment, the demand would be a mere nullity. (s) Thus, when a bill is made payable the first of September, it is not due till the fourth. And an action cannot be brought upon it, till the fifth.

When a bill or note is drawn, payable *so long* after sight, or after demand, or after a certain event, the day of presenting the bill for acceptance, or the note for payment, or the happening of the event, is to be excluded, in the computation of time, as is also the day of the date, where it is payable *so long* after

(m) *Id.* 20.

(n) 1 Connecticut Reports, New Series, 404.

(o) Chitty on bills, Brookfield ed. 211.

(p) *Vid.* *id.* 211 to 215. 2 Taunt.

Rep. 388. 7 Taunt. Rep. 397, & *vid.* 13 Mass. Rep. 131.

(q) *Vid.* *id.* 204, 207, 220.

(r) 6 T. R. 123.

(s) *Vid.* Chitty on bills, Brookfield ed. 207. 2 Wheaten's Rep. 277.



date.(t) Thus, if a bill drawn payable ten days after sight, be presented for acceptance, on the first day of September, the ten days expire on the eleventh, and the bill, by the addition of the days of grace, becomes due on the fourteenth. Or, if a note dated the first day of September, be payable two months after date, it is not due till the second of November; then, add the three days of grace, and it carries you to the fifth of November, before a demand can be made, so as to charge an indorser; for another rule is, that when a bill or note is payable so many months after a certain time, date or event, the computation is made by calendar, and not lunar months, unless otherwise expressed.(u) In these cases, where a time certain is specified, it should be computed according to the above rules; & the demand of the acceptor, or maker, should be made on the third day of grace, *precisely*. In order to make this demand, deliver the bill or note, or send it by letter to some disinterested person, who can be a witness, and request him to make the demand, pointing out to him the third day of grace, which he should do, at the same time making a memorandum of the day. This *letter*, or the *possession* of the bill or note, would be such evidence of authority to make the demand, as the acceptor or maker would be legally bound to credit.(v) This demand may be made of the acceptor, or maker personally, wherever he is found, even though the bill or note be payable at another place, unless he objects on *that account* (w) If he be gone from home, it should be presented to his agent, who has been used to pay money for him, if he have any such, to be found at his house; (x) and if he have no such agent, it is sufficient to demand it at his house, of his wife or servant; (y) or, in their absence, of some other person, belonging to the family, or if no person be at home, or to be found, or if the acceptor or maker has absconded, of course no demand is necessary.(z) But, where the maker or acceptor has merely removed from his former place of residence, still continuing to reside in the state, a demand should be made at his place of residence, at the time the money becomes due; though, when he has left the *United States*, a demand at the village, city or town, where the note is dated, has been held sufficient.(a) And if the acceptor or maker appoint by parol, a particular place of demand, the bill or note may be demanded there, even though he be absent.(b) If the bill be accepted, or note signed by an agent, the principal being abroad, it may be demanded of the same agent, *when*

(t) *id.* 205, & 8 Mass. Rep. 453.

(u) *Vid.* Chitty on bills, Brookfield ed. 209.

(v) 7 Mass. Rep. 483.

(w) 3 John. cas. 71.

(x) 2 Campb. Rep. 596.

(y) 2 Esp. Rep. 512 *Vid.* Chitty on bills, Brookfield ed. 185.

(z) 4 Mass. Rep. 45.

(a) 14 John. 114.

(b) 12 Mass. Rep. 172.

*due*, if the principal continue abroad. (c) If a particular place of payment be mentioned in the instrument, the holder should of course, make his demand at that place. (d) However, being there at the time and place, ready to receive it, is sufficient; (e) and this, at least, is essential, provided he mean to hold the drawer or indorsers. (f) An express waiver of notice of demand, does not waive the necessity of a demand, but the indorsee should be careful, if he mean to save the whole of the usual ceremony, in charging his indorser, to have him sign a special indorsement, waiving both demand and notice. (g) No particular form of words is necessary, in presenting a bill or note, and demanding payment. The bill or note should be exhibited to the acceptor, maker, or other proper person, and some words made use of, amounting to a request to pay.

If the third day of grace fall on Sunday; (h) or the fourth of July, (i) which is kept as a day of public rejoicing, and, therefore, generally produces a suspension of business; or a festival, in which the holder's religion forbids secular business; (j) in these and the like cases, the demand should be made on the day preceding the third day of grace; and the notice of non-payment, may be given or sent, either on the day of the demand, or on Monday, on the fifth of July, or the day succeeding the religious festival of the holder, &c. (k) But, if a note payable in specific articles, fall due on Sunday, it shall be adjudged payable, on the Monday following. (2 Connecticut Rep. N. S. 69.) And, if a bank have usages and by-laws, respecting demand and notice, those who deal there are bound by them. (l)

The same demand of payment, in time and manner, and the same notice of non-payment, as is necessary to charge an indorser, is necessary to charge the drawer of a bill, and a bill must moreover, be presented for acceptance, according to the above rules, in order to charge the drawer. But, before I go farther, it is perhaps proper, that I should notice one exception to the last remark, forming a very prominent distinction between bills of exchange and promissory notes, and which constitutes almost the only real difference between them, in respect to the necessity of making a demand, and giving notice.

We have already remarked, that the holder must take the same steps, to charge the drawer, as the indorser; and indeed,

(c) 2 Taunt. Rep. 206.

(d) Vid. the cases cited by Judge Van Ness, 17 John. 257, 8, 9, & 260.

(e) 6 Mass. Rep. 524.

(f) 13 Mass. Rep. 556.

(g) 6 Mass. Rep. 524.

(h) 2 Caines, 343.

(i) 2 Caines cas. error, 195.

(j) 2 Campb. Rep. 602.

(k) 2 Caines, 343. 2 Campb, Rep. 602.

(l) 9 Mass. Rep. 155. 14 id. 303.

the indorsement of a bill or note, is not only in *reality*, but very nearly in form, *equivalent* to the drawing a new bill. The only difference in form, is, that the *sum mentioned in the bill or note*, is ordered to be paid, instead of a *new or original sum*.<sup>(m)</sup> And so complete is this *analogy*, that although a bill or note do not contain the words, *order, or bearer*, or any other words, constituting them negotiable; yet, if a person put his name on the back of such a bill or note, he is liable as indorser; not that the bill or note will pass, by such an act, so as to enable the indorsee to maintain an action in his name, against the *acceptor or maker*; but because it is equivalent to drawing a new order or bill;<sup>(n)</sup> and he is rather in the nature of a *drawer*, than an *indorsor*, who must, we have remarked, however, be charged by the *same demand and notice*, as an *indorser*. But there is this distinction in *fact*, between drawing an *original* bill and making a *derivative* one, by indorsement: the drawer always knows, or is presumed to know, whether he have funds in the drawee's hands, to enable him to pay the draft; and the law always presumes in the first instance, that he has such funds; as, that there is a balance due, in the course of their deal, from the drawee to the drawer, or that money, bills or notes, have been deposited in his hands, to answer his acceptance, as well as that the indorser, or assignor, has *given value* for it;<sup>(o)</sup> and for this reason, it is always safest to make a demand, and give notice to the drawer or indorser, just as though these were the facts. But still, should the holder, either neglect altogether, to present the bill for acceptance;<sup>(p)</sup> or, if accepted, should afterwards neglect to make demand of payment,<sup>(q)</sup> or to give notice of non-acceptance,<sup>(r)</sup> or non payment<sup>(s)</sup> of the bill to the drawer, and yet is able to prove, that the drawee had no funds, or, as it is legally called, *effects*, of the drawer in his hands, to pay the bill; this will excuse the holder's laches: for there is no chance, that the drawer should sustain any damage, for want of such notice. But if the drawee have *effects*, to never so *small* an amount, at the time the bill is *drawn*, even though before acceptance they are appropriated or withdrawn, these steps must be taken;<sup>(t)</sup> and, if neglected, the law presumes that the drawer may have sustained damages, and the holder cannot recover against him.<sup>(u)</sup> And this want of effects, forms no excuse, for not giving notice to the *indorser* of a bill;<sup>(v)</sup> though if he has not given any consideration for the bill, and knows at the time the want of such effects, it will excuse

(m) Vid. Chitty on bills, Brookfield ed. 125.

(n) Vid. id. 105, and cases cited, n. (7.)

(o) id. 166.

(p) id. 141.

(q) id. 199.

(r) id. 166. & vid. also 1 Caines, 159.

(s) id. 233.

(t) id. 169.

(u) id. 166.

(v) id. 167, & vid. also 7 Mass. Rep. 449. 15 East, 216.

a demand and notice to the indorser ; and so, if the indorser have funds in his hands to discharge the bill. (w)

These effects should in general, either be *money*, or an *indebtedness* in money, from the *drawee* to the *drawer*. And a *chose* in action, left as a collateral security, for the acceptance, or for the purpose of raising money upon it, unless the money be actually received, will not be deemed effects ; (x) though it would undoubtedly be otherwise with *goods*, or other *choses* in possession, in the hands of the drawee, accompanied with the understanding between him and the drawer, that the bill is drawn on account of such effects, or if they are left with him for sale, or if the drawer has a right to draw, in consequence of engagements, between him and the drawee, or other cause. (y) And even a *bona fide* reasonable expectation of assets, in the hands of the drawee, by the drawer, has been several times held sufficient, to entitle him to the usual notice. (z)

Hardly any thing, except a *want* of effects, will excuse this *want* of demand and notice. Even the death, bankruptcy, insolvency, or imprisonment of the acceptor, though known to the drawer, will not have this effect ; but the demand should still be made of the executors, in case of death, and of the insolvent in the latter instances. (a) And so, though the drawee inform the drawer, before the bill is due, or presented, that he *will not* accept it. (b) But where a partnership drew a bill upon one of the firm, who accepted it, notice of non-payment was holden unnecessary. (c)

And even when there is a *want* of effects, if the drawer can show, that in fact he has sustained damage, for want of notice, he is still not liable. (d)

Where the acceptance is a conditional, or partial one, or is qualified, or limited in any way, so as to differ from the terms of the bill, notice must be given, if the holder mean to resort to the drawer or indorser, the same as if no acceptance had taken place ; unless, indeed, where there has been a total acceptance upon a condition, which has been complied with. (e)

(w) i l. 167. 7 Mass. Rep. 449.

(x) id.

(y) 4 Cranch, 141.

(z) Vid. 2 Campb. Rep. 503. 15 East, 216. 16 East, 43. 4 Cranch, 141.

(a) Vid. Chitty on bills, Brookfield ed. 171, & vid. also 1 Sergeant & Rawle's Rep. 334.

(b) id. 171.

(c) 1 Campb. Rep. 82.

(d) Vid. Chitty on bills, Brookfield ed. 173.

(e) id. 174.



Having noticed the above distinction, I shall here dismiss all farther attention to presentment for acceptance, and notice of non-acceptance; because in all other points, they are governed by the same rules, as *demand* and *notice of non-payment*, which I shall now resume the consideration of. The rules relating to demand, and notice of non-payment to the indorser, must be complied with in regard to the drawer, if it is intended to charge him, unless, indeed, as we shall see hereafter, where he has refused acceptance. This would dispense with demand and notice of non-payment.

After a neglect or refusal to pay, upon a demand of the acceptor or maker, the next step, if you mean to hold the indorser, is, to give him *notice* of such demand and non-payment. No particular form is necessary for this notice. It should import that a demand has been duly made, payment refused or neglected, and that the holder looks to the indorser for payment. He may inform the indorser of this himself, or send word by some other person; and as it may be necessary to prove it, the latter is the safer course, unless there be some witness present to attest his own notice. In order to prevent misconstruction, however, the better way will be to draw up a notice substantially, in this form:

To Mr. James Jackson,

SIR,

I HAVE caused payment of a certain note, given by Richard Roe to you, for fifty dollars, dated the first day of September, 1819, payable to you or order, ten days after date, and indorsed by you to me, to be this day duly demanded of the maker, who did not make payment thereof. I, the indorsee, do therefore look to you, the indorser, for payment thereof.

JOHN STILES.

Dated the 14th Sept. 1819.

This notice can easily be varied, to meet the case of a drawer or indorser of a bill, or a first, second, or third indorser. &c. or a case of non-acceptance of a bill. And though the description of the bill or note, be not exact, as if the *time* of its falling due be mistaken, or the *name* of the maker or acceptor, still if the error is not calculated to mislead, or if it be enough to put the party on inquiry, the notice is good; as if there be no other bill or note payable to the one mentioned as payee and the like, (its sufficiency, being a question of fact for the jury.) (f) And it need not state that the acceptor or maker was absent, so that

no personal demand *could* be made ; for any act equivalent to a demand, several instances of which we shall hereafter mention, may be *called* a demand in this notice.(g)

Where the acceptor or maker, on demand of payment, pays part of the money due, this need not be mentioned in the notice of non-payment.(1 John. cas. 131. 16 John. 41.)

This notice should, in general, come from the holder, or some one authorized by him, or some one liable as indorser ; for a notice from the drawee of a bill, who has refused acceptance, is not sufficient ;(h) But a notice given by the acceptor to the drawer, is valid.(i) It is not sufficient notice to leave a note with the indorser, for collection of the maker ;(j) and if two or more payees, indorse their individual names, not being partners, all should have notice.(k)

Make a copy of your notice, and send it the day, or the day after the demand, *at farthest*,(l) by your friend to the indorser, if he reside in the same town with you, having first compared the draft and copy, to see that they agree. It is sufficient proof of its being a copy, that you read the original yourself, and he looks over you upon the copy, and finds it to agree.(m) He should then put the initials of his name on the draft read, to remember it by ; and proceed immediately to deliver the notice to the indorser. If both parties live in the same town, the notice should be personal if possible ;(n) but if they do not live in the same town, it is always sufficient to let your friend do up the notice as a letter, and put it in the post-office, so that it will go by the *next* regular post after the demand.(o) And the post of the *next day*, after the demand, will do, though a post depart the day of the demand, and after it is made.(p)—And this notice is sufficient, even though the letter miscarry, or the indorser be absent, and so cannot receive it.(q)

This letter should be directed to the drawer or indorser's place of residence, though he reside at a place different from that, where the bill or note is made payable, provided his residence can be ascertained ;(r) and so, though he reside at a place, different from the one at which it is dated, if his resi-

(g) 8 Mass. Rep. 260. 2 Caines, 121.

(h) 14 Mass. Rep. 116. 2 Campb. Rep. 177.

(i) 4 Campb. Rep. 87.

(j) 11 John. 180.

(k) 1 Connecticut Rep. N. S. 367.

(l) 2 Caines, 343. 1 John. cas. 328.

(m) 3 Day's Rep. 499.

(n) 1 Connecticut Rep. N. S. 329.

(o) id.

(p) 2 Wheat. Rep. 377. 2 Barnwell & Alderson's Rep. 496.

(q) 6 Mass. Rep. 316. 9 Mass. Rep. 159.

(r) 13 John. 432. 5 Binney's Rep. 541. 16 John. 218.

dence be within the state. But if he has removed out of the state, a demand at the place, where the bill or note is dated, will be sufficient.<sup>(s)</sup> And if it be directed to a place differing from his residence, but to a post-office where he usually gets his letters, such a direction will be proper, though there be a post-office in the town where he resides.<sup>(t)</sup>

This notice should not be given before a demand, even though the demand be on the same day, and if so given, it is a nullity; but after demand, it may be given the same, or the next day, at the choice of the holder.<sup>(u)</sup>

If the indorser or drawer be dead, notice should be given to his executors, or administrators, if known to the holder; but, if neither the death, nor personal representatives be known to him, the usual notice is sufficient; and where, in such case, the notice was left at the indorser's late dwelling house, and another sent by mail post to his family in the country, (he having died at sea) this was holden sufficient.<sup>(v)</sup>

A notice to produce the letter on the trial, is not necessary, and a copy is good evidence without it;<sup>(w)</sup> or it may be proved by parol.<sup>(x)</sup>

The sudden illness or death of the holder, or his agent, will be an excuse for want of a regular notice, to any of the parties, provided it be given, as soon as possible, after the impediment is removed; and so will the absconding, or absence of the drawer or indorser, if he be advised by notice on his return; or if the holder be ignorant of the drawer or indorser's place of residence, it is sufficient, if he use reasonable diligence to discover where he may be found; and what is reasonable diligence, is a question of fact, for the justice sitting alone, or the jury under his direction. And it is enough, that the holder make inquiry at the residence of the drawer of a bill, or the maker of a note, for the residence of the payee. But the loss of an accepted bill, or a note, or a mistake, in directing a letter, or the bankruptcy of a drawer, or indorser, would be no excuse.<sup>(y)</sup>

Where the holder is ignorant of the residence of the drawer or indorser, it is not enough, that he barely inquire for him at the place, where the bill or note is payable; but he should inquire of others, whose names appear upon the instrument, or

(s) 14 John. II4.

(t) 16 John. 218.

(u) 2 Caines, 343. 6 Mass. Rep.

449. 3 Campb. Rep. 193.

(v) 17 John. 25.

(w) 1 Starkie's Rep. 28.

(x) 3 Caines, 174. 9 John. 136.

(y) Vid. Chitty on bills, Brookfield ed. 173, 4.

others of the same name, if he can find any in the city directory. (z) But calling at the drawer's or indorser's door, during business hours, and knocking loud enough to be heard, and repeating this, two successive days, with a view to give notice, the door being each time locked, is sufficient, to excuse the want of *actual notice*. (a)

Notice is also excused, as to an indorser, for whose accommodation a bill or note is indorsed ; for then, he is the one who is ultimately liable to pay it. (b) And where it appeared that the maker was insolvent, and had assigned to the indorser all his property, to secure him against the indorsement in question, and other indorsements ; (c) or where before the note became due, the indorser informed the holder, that the maker had absconded, and requested a further time of payment ; (d) or where a malignant fever prevails at the indorser's place of residence ; (e) in these cases notice is excused. And the demand and notice is, in like manner excused, if the note or bill be void for *usury, forgery, &c.* (f) and so if a bill be *refused acceptance*, and notice of non-acceptance has been given, it is not necessary to demand payment upon it, or give notice of non-payment (5 John. 375.)

But in all other cases, except those coming within the principle of the above enumerated ones, the holder must make demand of payment, and give notice of non-payment ; otherwise the drawer or indorser will be discharged, and this, even though the acceptor or maker have become insolvent. (g) And, though the indorsement were for the accommodation of the maker, or acceptor, (h) or for the accommodation of the drawer, whether the drawee have effects or not, (i) demand must be made, and notice given.

A bill or note may be indorsed over after it is due, in which case it must be demanded, and notice given in a reasonable time, (j) (which is a question compounded of law and of fact.) (k) And in prudence, the holder should set about it immediately, unless he have some excuse for not doing it ; for we have before seen, in the case of demanding a bill or note, and giving notice, where it is payable on demand, that a *reasonable time*, means, in general, a *very short one*.

(z) 3 Campb. Rep. 262, & vid. 3 id. 461. 12 East, 434.

(a) 1 Maule & Selw. 345.

(b) 11 John. 186.

(c) 1 Sergeant & Rawle's Rep. 334. 5 Mass. Rep. 170.

(d) 1 John. cas. 99.

(e) 2 John. cas. 1.

(f) 9 Mass. Rep. 1.

(g) 9 Mass. Rep. 205. 10 id. 52 12 id. 89. 11 East, 114. 1 Sergeant & Rawle's Rep. 334.

(h) 4 Cranch 141.

(i) 7 Mass. Rep. 449.

(j) 9 John. 121.

(k) 8 John. 173.



Due notice will sometimes be inferred from circumstances; such as the indorser's having paid part, without objecting the want of notice. (l) So as to the drawer, where he, and the acceptor, both wrote a letter, that the money should be paid before the next term. (m) Or the drawer or indorser may waive notice, before given, by stating to the holder, that *it is unnecessary, and that he will inquire.* or the like words. (n)

It is said, in one case, that doing an act equivalent to a notice, will not entitle the plaintiff to alledge a notice in his declaration, but that he can do this only where actual notice is given, and that if otherwise, he should state his excuse specially; (o) but of this quere? (p)

The holder should give this notice, to all such parties to the bill, or note, as he means to look to for payment, whether drawer or indorsers. (q) And he may, in this way, charge, and make liable to himself, a dozen, or any greater or less number, of prior indorsers, besides the drawer or maker, if so many names appear on the bill or note. These are all, *individually*, liable to him, for the amount; and he may have his suit, against *each* of the whole number so charged, in separate suits, at the same time; and he may pursue these suits, till he have obtained satisfaction, from some one. And this, as we have seen, because each one, whose name appears upon the bill or note, is liable to him upon a *separate* contract, for the *whole* amount. And he is so liable *immediately*, on default of payment by the acceptor, or maker, and due notice given of such default. Thus we see, that the holder is not bound to look to *one*, or sue *him*, in preference to *another*; (r) and he may charge *each* of these parties in execution, on his judgment, by imprisoning them; or he may wait, and imprison them *severally*, and *successively*, until he shall obtain actual satisfaction of some one. (s) But this must be understood, only of those who became parties *prior* to himself; for, to those who became parties, *subsequently* to himself, or derive title *under him*, by indorsement, he is *himself* liable as indorser. (t) Actual payment, by one of the parties, will of course discharge the others, from the principal sum; (u) and indeed, will discharge the *other* actions also, unless judgment be obtained in them. So that, where the holder commences *several* suits, against different parties, he should be careful, *not* to receive satisfaction of one suit, without payment of the costs of the

(l) 1 Taunt. Rep. 12.

(m) 1 Starkie's Rep. 217.

(n) 4 Campb. Rep. 281. 1 Starkie's Rep. 116.

(o) 6 Mass. Rep. 386.

(p) Vid. 2 Caines, 121.

(q) Vid. Chitty on bills, Brookfield ed. 185.

(r) id. 366 to 68, id. 69.

(s) id. 369, 79.

(t) id. 368, 3 Bay's Rep. 512.

(u) id. 370.

whole, unless judgment be obtained in all the others ; for, in such case, he would not only lose his costs of the other suits ; but be obliged to pay costs to the defendants.(v) But after he obtains judgment in all, he may undoubtedly, after receiving satisfaction of one, proceed to collect the costs of the other.— Each is liable, only for the costs of the suit, against himself. The maker is not liable to the payee indorser, for the costs of a suit, brought against the latter, by an indorsee, without a special promise of indemnity.(9 John. 131.)

But where there are several indorsers, it is not necessary that the action should be brought in favour of the holder, or of the last indorsee. They may arrange matters among themselves, so that any one indorsee may sue the drawer, acceptor, or maker, instead of a preceding indorser, striking out all the names below his own ; and a similar proceeding may be had, against a prior indorser.(w) But the drawer, or prior indorsers, if they wish to commence an action on the bill or note, must first get rid of the subsequent indorsements, either by the arrangement above mentioned, or acquiring a right to strike them out, by paying the bill or note to the holders. Actions may thus, as we have seen, follow successively, by the holder against his immediate indorser, till satisfaction be obtained ; by the latter, against his indorser, and so on, up to the payee, and drawer, who, last of all, may sue the acceptor. And when satisfaction is made by a previous party, to a subsequent one, either upon, or without judgment, the instrument becomes his own, and he holds it in his *original capacity*, the same as though he had never parted with it ; and he may maintain an action against all parties to it, accordingly. (Vid. Chitty on bills, Brookfield ed. 267, 8) The holder may, if he chooses, charge, by notice of non-acceptance, or non-payment, his *immediate* or *any other* indorser, or the payee, or drawer *alone*, and neglect to give notice to all others, whose names appear on the bill. And, on one indorser thus receiving notice, he must notice such party or parties, as *he* intends to charge, who may, in like manner, notice those who stand behind him, on the instrument. On one indorser receiving this notice, it is enough if he give notice to the one who indorsed to him, or other party that he means to charge, the same day, or the day after his receipt of notice to himself, if his indorser reside in the same town ; or send it by the next day's post, if he reside at a greater distance, or, according to the rules before laid down, in case of the first notice.(x) And in this chain of notices, it has been holden

(v) 2 Mass. Rep. 171.

(w) Vid. Chitty on bills, Brookfield ed. 266.

(x) 2 Campb. Rep. 208.

enough, on the refusal of payment of a bill or note, that the drawer, or indorser, receives notice, in as many days as there are indorsees subsequent to himself, unless it be shown, that some indorsee gave notice, *within* a shorter time, than a day after receiving it; for if any one has been beyond the day allowed, the drawer and prior indorsers, are discharged. (y) I presume that this was, where they all resided in the same town.

However, a notice from the holder or any other person, who may have a *right of action*, on the bill or note, will, in general, enure to the benefit of all the antecedent parties, between the party giving, and the party receiving notice, and render a farther notice, from any of those intermediate parties, unnecessary. It is however advisable, for each party, immediately upon receipt of notice, to give a fresh notice to such of those parties, as a reliable over to him, and against whom he must prove notice. For he can then have the *evidence* of such notice, more within his own control. (z) But should he omit this, there is no doubt, that notice from any other party to the bill, will answer his purpose, on his getting hold of the evidence to prove it. (a)

The drawer may sue the acceptor, *on the bill*, for not paying it, but no action lies, *on the bill*, against the drawee, for not accepting, though it would lie on an engagement to accept. (b) In case a bill or note be accepted, or made, for the accommodation of another, the acceptor or maker, if he is obliged to pay, may sue such person, for money paid for his use, on the *implied obligation of indemnity*. (c)

#### HOW ANY OF THE PARTIES MAY BE DISCHARGED.

4. The holder may receive part pay, from any of the parties, without discharging the others, and may hold them for the balance; but it is otherwise, if he *give time* to an acceptor or maker. And, though the holder of a *joint and several* note, sue one of the makers, and levy part of the debt by execution, this does not discharge the other, but he will be holden for the balance. And, though the giving time to an acceptor, maker or indorser, will discharge all *subsequent* indorsers, unless by their consent; yet, the discharge of a *subsequent* indorser, will not discharge a *prior* indorser; (d) and the holder may

(y) id. 210. n.

(z) Vid: Chitty on bills, Brookfield ed. 184, 5.

(a) 2 Campb. Rep. 373. 1 Starkie's Rep. 34.

(b) Vid. Chitty on bills, Brookfield ed. 267.

(c) id. 268.

(d) Vid. Chitty on bills, Brookfield ed. 227.

sue such *prior* indorser, even after he has let a *subsequent* one out of goal, on a letter of licence, without his paying the debt; nor will the giving time to a payee indorser discharge the drawer; (e) and where the holder of an accommodation note, received a composition from, and covenanted not to sue the payee, for whose accommodation it was made, it was held that he might, notwithstanding, sue the maker; (f) but if an indorsee, having notice that the bill was accepted, or the note made, without consideration, receive part pay from the party, for whose benefit the bill was accepted, or note drawn, and give him time to pay the residue, the acceptor or maker would be discharged; as if he receive part payment, from the *drawer*, for whose accommodation such bill was accepted and give him time. (g) But it would be otherwise, if the indorsee had no notice, that it was an accommodation bill, or without consideration. (h)

Where the acceptor or maker has become insolvent, the debt may be proved, and a dividend received, without discharging the other parties; (1 John. cas. 107) but if the holder of a bill compound with the acceptor, maker, or other party, without the assent of the drawer, or other subsequent parties, he releases them from their liabilities; though it would be otherwise with the drawer, if he had no effects in the hands of the acceptor. The reason, why a composition has this effect, is, that it forever deprives the parties, between the holder and the acceptor, or maker of any remedy, over against the latter. (i)

It is said, that where a bill is accepted for part, and notice of such partial acceptance given, the holder should, on the bill becoming due, if he receive such part, still give notice of the non-payment of the residue. (j)

But the drawer of a bill, and the indorsers of a bill or note, being considered sureties, and the drawee, acceptor or maker, primarily liable, the giving time to such drawee, acceptor or maker, will, in general, discharge such drawer or indorsers, from all liability. And so, if a bond, or any security, payable at a future day, be taken of such drawee, acceptor or indorser; or, where the holder has obtained a judgment, and execution, received part, and taken security for the residue, ex-

(e) 4 Maule & Selw. Rep. 226.

(f) 5 Esp. Rep. 178.

(g) 2 Campb. Rep. 185.

(h) 4 Taunt. Rep. 730. 17 John.

(i) Vid. Chitty on bills, Brookfield ed. 228.

(j) id. 228, 9.



cept only a nominal sum, of such original party ; or let him out of custody on an execution ; or taken part pay, and agreed to take an acceptance from him, for the residue, payable at a future day, retaining the first bill or note, as a collateral security, even if such part pay be taken, and agreement made with an acceptor, who has no effects in his hands ; or if the holder has taken a confession of judgment, payable by instalments, at a distant time, it will discharge the subsequent parties.<sup>(k)</sup> But the mere agreeing to stay execution (on receiving a confession) to a time when a judgment and execution might have been obtained according to the course of the court ;<sup>(l)</sup> or taking a cognovit, without giving time, would not have this effect.<sup>(m)</sup>

But the assent of the parties interested, or a clear subsequent recognition of the act by them, would clearly warrant any of the above steps ; and they would be liable to a suit immediately, the same as if no measures had been taken. And besides, if the drawee or acceptor, have no effects in his hands, wherever, for that reason, a holder would be excused from giving notice of non-acceptance, or non-payment, he may also take any of the above measures, without shaking his security against the subsequent parties ;<sup>(n)</sup> and so, where a bill is accepted, or note given, for the accommodation of a drawer or indorser, the holder may give time, take security, &c. without impairing his right, against such drawer, or indorser, for the latter are not sureties, but principals.<sup>(o)</sup>

In the above instances, where tampering with the drawee, acceptor or maker, has been held to discharge the subsequent parties, a similar act or indulgence, to a drawer, or prior indorser, would equally discharge all subsequent parties, if done or granted without their consent.<sup>(p)</sup>

There is, however, no obligation of *active diligence*, on the part of the holder, to sue the acceptor, maker or indorsers, and he may forbear this as long as he chooses ;<sup>(q)</sup> he may even receive proposals for security ; and an agreement, not to sue, made, *without consideration*, and without taking any new security, would not work a discharge, because such agreement would be void ;<sup>(r)</sup> but receiving a premium for such delay, will discharge the indorser.<sup>(s)</sup> But it will not discharge

<sup>(k)</sup> Vid. Chitty on bills, Brookfield ed. 224, 5.

<sup>(l)</sup> 18 John. 28.

<sup>(m)</sup> 4 Bos. & Pull. 474.

<sup>(n)</sup> Vid. Chitty on bills, Brookfield ed. 225, 6.

<sup>(o)</sup> 3 Campb. Rep. 231. 362.

<sup>(p)</sup> 8 East, 576. 7 Mass. Rep. 494.

<sup>(q)</sup> Vid. Chitty on bills, Brookfield ed. 224. 17 John. 176.

<sup>(r)</sup> Chitty on bills, Brookfield ed. 226.

<sup>(s)</sup> 16 John. 70.

the drawer or indorsers, though they, or either of them, should request the holder to sue the acceptor or maker, and he should refuse, or neglect, to do this, till the latter became insolvent; (t) and even refusing, on request of the indorser, &c. to take the maker, &c. in execution, after having obtained a regular judgment against him, will not prejudice the holder. (u)

But though the holder give the acceptor, or maker, a discharge from the bill or note, this will not release a drawer or indorser, who retains in his hands, the funds of such acceptor or maker, for the express purpose of paying the bill or note; (v) and where the drawer or indorser, with full knowledge of the time being given, yet promises the holder to pay him the bill, such promise will bind. (w) And where the holder released one of several joint makers, excepting, from such liability, as he may be under to the indorsers, this was holden not to discharge an indorser. (2 Caines' Rep. 121.)

And the consequences of omitting to present for acceptance, or payment, or give notice of the default of acceptance, or payment, may be done away, by some act of the person entitled to object the want of it; or in case of a conditional acceptance, by the completion of the condition, before the bill becomes payable. Thus, a payment of part, or a promise to pay the whole; (x) or to see it paid; or an acknowledgment, that it must be paid, made by the party, who objects the want of notice, with a knowledge of the holder's neglect, will amount to a waiver of the laches, and entitle the holder to a recovery, even though made under a mistake of the law; but such act or promise, in order to bind, must be explicit, unconditional, and unqualified, and made out clearly in evidence; (y) not a mere proposition to pay by instalments, or to give a bill, unless such offers are accepted; or, alluding to a number of bills, including the one in question, saying, "I will see them paid." (z) And if such person pay the money to the holder, having a knowledge of, (or the means in his power of knowing) the circumstances, he cannot recover back the money, unless there be a deceit or fraud, practised upon him. (a)

A promise to pay, or other act amounting to a waiver, must not only be with a knowledge of the circumstances, calculated

(t) 16 John. 152. 17 John. 176.

(u) 3 Wheaton's Rep. 520, 5.

(v) 6 Mass. Rep. 85.

(w) 12 East, 38.

(x) 5 John. 248. id. 375. 3 John.

(y) 5 John. 375.

(z) id.

(a) Vid. Chitty on bills, Brookfield ed. 189, to 192.

to discharge the defendant, but it lies with the plaintiff to show such knowledge at the trial ;(b) and it will not be presumed, from the fact of promising to pay, or other act, insisted on as a waiver ;(c) though it may be inferred from circumstances.(d)

I lend you my note, payable to you or order, which you sell and indorse to A, for a valuable consideration. You, afterwards becoming insolvent, your creditors, among whom are A, and myself, by a writing signed, but not sealed (upon a nominal consideration,) discharge and release you from all debts, demands, &c. due to us respectively, A, not knowing for whose accommodation I gave the note. I afterwards pay the note to A, and bring my action against you, for money paid, laid out, &c. It was held in such a case, that A's discharge, under the circumstances, did not exonerate me, and that my discharge to you, being without any substantial consideration, and not under seal, was inoperative, either as a release, or an accord and satisfaction, and that therefore I was obliged to pay the money to A, and might recover it of you.(e)

HOW FAR THE RECEIVING A BILL OR NOTE FOR A DEBT, IS A PAYMENT.

5. As to the question, how far the receiving a bill, or note, is payment of a precedent debt ; this turns principally, upon the inquiry, whether it be received, at the time the debt is created, or in payment of a precedent debt.

Where John says to James, " if you will let me have such an article, or perform such an act, I will let you have a note against Richard Roe, payable to me or bearer, or to A or order, & indorsed in blank," and James agrees to take the note, and deliver the article or do the act, and this agreement is executed ; this is a mere exchange of the article or service, for the note, the same as if two men should exchange horses, and such note is undoubtedly a payment. And so, if John had given his own note, or any other bill or note under similar circumstances, if not drawn or indorsed by him, and he had made no promise to indorse such bill or note, it would undoubtedly be a payment ; and in *Whitbeck v. Van Ness*,(f) where the above points are decided, the authorities on this subject, are so fully collected and considered, that I shall content myself with referring to that case, without quoting any additional ones. The consequence of such a bill or note being payment is, that the one, who receives it, must be content with the remedy, upon his paper alone, and

(b) 16 John. 152.

(c) id.

(d) 12 Mass. Rep. 52.

(e) 17 John. 169.

(f.) 11 John. 409. vid. 15 J. 241.

cannot sue for the *article* sold, or *service* performed, as a *consideration* for it, though the party or parties to it be, or afterwards become utterly insolvent. And where the defendant's own note, draft or indorsement, is received under the like circumstances, the remedy is against him, upon the *bill* or *note* and not for the *article* or *services*, for which it was received. (1) — But, if there be a fraudulent representation, or concealment, as to the money being due, or the circumstances of the party, or parties, to the bill or note; such payment may be treated as a *nullity*, and an action brought for the *consideration* paid for it, or an action on the case for the *fraud*, even though the bill or note was taken in consequence of such fraud, to be collected at the plaintiff's own *risque* (g) And such action may be brought *immediately*, though such bill or note be payable at a future day; and so, if the bill or note be *usurious*, (11 Mass. Rep. 359.) or the drawee have no effects in his hands, (6 T. R. 52. Esp. Rep. 3.) (h) And so, where the bill or note is received conditionally, or at the risk of the defendant, or as collateral security, it being understood that the defendant shall still continue liable; if it be not paid, an action lies upon the original consideration. (i) But even in such cases, if the plaintiff transfer the bill or note, it shall operate as a payment. (j) Though, even if it has been indorsed over, by the creditor, yet, if he receive it back, and can produce and cancel it on the trial, or shew it to be lost, his cause of action revives, or continues unimpaired. (15 John. 247.)

On the other hand; if *John* already owes *James* a debt, and he agrees to receive a bill or note for it, against other persons; this is not a payment, unless it is expressly agreed to be received as such by *James*, the creditor, and that he should run the risk of its collection. (k) And it is not payment, even though a receipt be given for it *as cash*; and if a receipt be given for cash generally, as payment in full, of the debt, it may still be shown, that a part of the sum mentioned therein, was a note or bill, and, if it be not paid, such transaction will not discharge the debt. (l) But on receiving such bill or note in payment,

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(1) In *Breed v. Cook* and another, 15 John. 241, *on certiorari*, the rule is thus stated, by the Supreme Court: "If the vendor of goods receive from the purchaser, the note of a third person, at the time of sale, (such note not being forged, and there being no fraud or misrepresentation on the part of the purchaser, as to the solvency of the maker,) it is deemed to have been accepted by the vendor, in payment and satisfaction, unless the contrary be expressly proved."

(e) 6 John. 110, & *vid.* Chitty on bills, Brookfield ed. 96. 15 John. 475.

(h) *id.* *ibid.*

(i) 9 John. 310.

(j) 3 Cranch, 318.

(k) 5 John. 68. 7 John. 311. 2 John. cas. 438. 3 *id.* 71. 9 John. 310. *Vid.* also Chitty on bills, Brookfield ed. 127. 4 Mass. Rep. 93. 1 Connecticut Rep. N. S. 409.

(l) 5 John. 68. 8 John. 389.



the creditor cannot sue on the original consideration, till it fall due, unless there be a fraud practiced upon him, by the debtor. (n) And, if he sue on the original consideration, even after the bill or note falls due, he must either show it to be lost, or produce and cancel it at the trial. (n) But if the bill or note be lost through the creditor's neglect, or he sells it to another ; (o) or agrees to receive it in payment, and run all risks, (p) the debt is discharged. The law will presume that a negotiable note, is agreed by the parties, to be received as payment of a simple contract debt, if it be taken for such debt, though this presumption may be encountered by proof to the contrary (q) And it has been determined in Massachusetts, that a forged note received in payment of a debt, when both parties are ignorant of the forgery, is a valid payment ; (r) but in this state, if forged notes or bank bills, be received as payment, though both parties be innocent, such payment is a nullity. (s)

I give my own note, in exchange for that of myself and partner, this pays the partnership note ; (t) though not, if it be received conditionally, "when paid to be credited," &c. (u) Though a note for any debt, received thus, upon the usual condition, "when paid to be in full of accounts, &c. ;" if the creditor negotiate it, will be an absolute payment. (v)

Where I owe a debt, as surety, and I give my promissory negotiable note, for the debt, this is equivalent to the payment of the money, and I may have my action, as for money paid, laid out, and expended ; though not so, if I give a bond ; (w) and so, if a surety be imprisoned on an execution for the debt of his principal, this action lies. (x)

If a party to a bill or note, pay the money, without being duly charged, with demand and notice of non-payment, he pays it in his own wrong, and cannot recover over against any party, who stands behind him, upon the paper. (y)

(m) id. & vid. Chitty on bills, Brookfield ed. 96.

(n) 1 John. 34. 10 id. 104.

(o) Vid. Chitty on bills, Brookfield ed. 138, 9, & 3 Cranch, 318.

(p) 6 Cranch, 253, & vid. Chitty on bills, Brookfield ed. 127.

(q) 5 Mass. Rep. 302, per Parsons' C. J. & vid. 11 id. 359. 1 John. 34. 10 id. 104.

(r) 6 Mass. Rep. 321. 7 id. 296.

(s) 2 John. 455.

(t) 12 John. 409.

(u) 17 John. 340.

(v) 3 Cranch, 318.

(w) 8 John. 202. 2 Esp. Rep. 570. 5 Mass. Rep. 299.

(x) 1 Peters' Rep. 262. But Que-  
? & vid. 8 John. 202, 5 & 6.

re (y) 2 John. cas. 75.

An order, not negotiable for the payment of money, but which has not been paid, nor accepted, by the drawee, is not a payment or extinguishment of a precedent debt. (z)

But suppose the debtor *draws* or *indorses* his bill of exchange, or indorses his promissory note against a third person, to the creditor, either in payment of his debt, or as security or as conditional payment, in either of these cases, if the draft, or indorsement, be given in good faith, and the drawee have effects in his hands, it is agreed, that the bill or note may become an absolute payment by the *neglect*, or, as it is generally called, the *laches* of the creditor ; and so, if it be given as collateral security, or conditional payment, at the time of sale. (a) But what shall be esteemed such *laches*, as will make the note or bill, in these cases, a payment ? This question is said to turn upon the principle, "that by keeping possession "of the bill or note, after it becomes due, without getting the "money from the drawee, acceptor or maker, or other person "originally liable ; it is giving an implied credit to such person, "and, by not giving notice, (*in case of his failure*,) preventing "the indorser, or person who paid away the bill or note, from "getting the money, or otherwise securing himself." The law is said therefore, to impose the duty of *due diligence*, upon the creditor, in proceeding upon the bill or note, and, in default of payment, giving notice to the person of whom he received it. (b)

Under the above rule it has been decided, that, where the creditor demanded the money of the maker on a note indorsed to him, in payment by his debtor, but "indulged the maker with further day of payment, several times ;" (c) where he neglected to demand the money, *for about four months*, on a bill or order, not negotiable, drawn by his debtor (to pay the debt, in favour of the creditor ; (d) and, in a like case, where the creditor omitted to demand the money, *from December till March* ; (e) where he kept a banker's bill, which he received for a debt, *from April to August* ; (f) Where, on the maker's refusing to pay, the creditor took a new note of the same tenor and date, the first being cancelled by the maker ; (g) in these, and I believe some other like cases, *the acceptor or maker having failed*, it has been holden, that the *laches* of the creditor, made the bill or note his own, and he must sustain the loss ;

(z) 15 John. 224.

(a) Vid. Chitty on bills, Brookfield ed. 97.

(b) Esp. dig. pt. I. N. York ed. 133.

(c) 1 Burr. 352.

(d) 2 Willson, 353.

(e) 3 John. 230.

(f) Esp. Dig. vol. 1, part 1. N. York ed. 138.

(g) 1 Stra. 550.

and the *failing* of the principal debtor, seems to be made a main ingredient, in all these cases ; and the plaintiff was in several of them, not allowed to recover, on his original claim, because his *laches* had made the note payment.

On the other hand, what is reasonable diligence, in order to charge the debtor, as a party to the bill or note, we have seen is a question of law and fact, and is defined with tolerable clearness, in all cases ; and in most cases it is now perfectly understood. In *Tindall and others v. Brown*,<sup>(h)</sup> which was very fully considered, both in the King's Bench, and Exchequer Chamber, a rule was laid down, which has been, in the main, ever since adhered to, by all courts who ground their decisions upon the English common law. There, the plaintiffs, who were indorsees of a promissory note, indorsed to them by the defendant, though they demanded the note, on the day it fell due, (the 5th October, 1784,) suffered the next day to elapse, before they gave notice of non-payment to the defendant, all parties living in the same place. The defendant refused to take back the note, and pay it, on the ground that the plaintiffs had made it their own, by their *laches*, in not giving notice, *at least, the day before*. Notice *was* given, on the 7th of October, and the note tendered to the defendant. Two juries, successively, found for the plaintiffs, but a new trial was granted, and on the third, a verdict and judgment rendered for the defendant, which was confirmed, *on error*, in the Exchequer Chamber. The action was brought, against the defendant, upon the note, as *indorser*. We have seen, with how much strictness, the doctrine of that case, has been since adhered to, and can form a very clear idea from this, and other cases which we have cited, what *laches* means, in its application to demand and notice, where the parties upon the bill, or note, are before the court *as such*. But has it the *same* meaning, in its application to a *creditor*, who has been guilty of the same *laches in fact*, with regard to a *bill or note*, received of a *debtor*, and *drawn or indorsed* by him, to *pay* a pre-existing debt ? or, which is the same thing, where *laches* are concerned, to *secure* such debt ? There is, I believe, no case in our own courts directly deciding this question ; but it is evidently taken for granted, by an author, who is at the present day, oftener consulted, on the doctrine of bills and notes, than any other, that *laches, which will make the original delivery of the bill or note, equivalent to payment, is the same, which will discharge the drawer or indorser, if the suit be brought upon the instrument itself ; and that where the drawer, or indorser, cannot be sued upon the bill or note, as such, neither can he be sued, on the debt, for the purpose of paying, or*

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(h) 1 T. Rep. 167. 2 id. 186.

securing which, he drew, or indorsed it. (i) And such appears to be the doctrine, as at present held, in the English courts. In *Bridges v. Berry*, (j) the defendant was acceptor of a bill of exchange, payable to the plaintiff, for one hundred and nineteen pounds. On its becoming due, and being demanded, he prevailed with the plaintiff, to take another bill, drawn by him, on one Ivory, payable at two months, to the defendant's own order, and, by him, indorsed to the plaintiff. The balance, he paid in cash. This second bill was given as security merely, both bills remaining in the hands of the plaintiff. When the second bill became due, it was not paid, by the acceptor, but no notice of non-payment was given to the defendant. The action was brought, upon both bills, but it was admitted, on the trial, that no recovery could be had upon the second, against the defendant as indorser, for want of notice; but it was insisted, that he was, notwithstanding, liable as debtor, upon the first bill, on the ground, that giving the second was no payment of the precedent debt. But the court held, that the defendant was discharged from both; and, that the plaintiff, by his laches, had made the second bill a payment of the first. And, *per curiam*. "The defendant delivered a bill to the plaintiff, as security, upon which, he, (the defendant,) had a right to sue other persons. The plaintiff, by not giving him notice of its non-payment, had put it out of his power, to recover what was due thereupon; and, having so done, he shall not be permitted to resort to the first bill."

The same doctrine seems to have been taken for granted, in *Williams v. Smith*, (k) which was the case of a payment of a precedent debt, by promissory notes, without indorsement, and the usual strictness, in demanding payment, and giving notice, was conceded to be necessary, in that case. The same ideas of strictness seem to have been entertained, both by the court and counsel, in *Wright v. Shawcross*, (l) which was the case of a bill of exchange, delivered by the defendant in payment of a debt, contracted at the time, without being indorsed by the defendant.

The two first of these cases, were considered upon principle, having, evidently, nothing to do with the statute of 3 and 4 Ann. c. 9. s. 7. prescribing a course of proceeding, as to demand and protest, upon a bill, received for and in satisfaction of a debt. (m) For the first was the case of a want of notice of non-payment, upon a bill received as collateral security. The second, related to payment by a promissory note. The third, was in part, a ques-

(i) Vid. Chitty on bills, Brookfield ed. 97.

(j) 3 Taunt. Rep. 130.

(k) 2 Barnwell & Alderson's Rep. 496.

(l) 2 Barnwell & Alderson's Rep. 501, in note.

(m) Vid. this statute quoted, Esp. Dig. pt. 1. N. York ed. 133.



tion, as it regards *notice of non-payment*, and, in this respect, is equally uncontrolled by the statute of Ann.

The principle of the case in *Taunton* is, that the debtor, who draws, or indorses the bill, or indorses the promissory note, has a right, in the event of its non-payment, to pay the money himself, and turn round with a remedy against the acceptor or maker; and, that if the creditor, who is the holder, deprives him of this remedy, or suspends it for an instant, by his laches, he not only discharges his debtor, as a party to the instrument, but the original debt, for paying or securing which, he received it, is extinguished forever. And why not? Here is certainly laches, of the same kind, though not in the same degree, as that noticed by the earlier cases, and who shall set bounds, or prescribe the degree, if a creditor, in the instances we have been considering, is once allowed to go beyond the point, where neglect is said to attach, and to destroy his remedy, for every other purpose, except the anomalous one of collecting a precedent debt, in payment of, or as security for which, he has received a bill or note. If the point decided by the case, in 3 *Taunton* 130, and the doctrine clearly conceded in the subsequent ones, in 2 *Barnwell & Alderson* 496, & 501, are law, on this side the Atlantic, we may console ourselves, that we possess a more certain rule on this subject, than what I believe is generally conceived to exist.

It is clear, that where the bill or note is dishonoured, and the holder uses *due diligence*, the debtor is not only liable on the bill or note, but the original consideration also revives.<sup>(n)</sup>

#### WHEN A BILL OR NOTE IS EVIDENCE UNDER THE MONEY COUNTS.

6. I hold a promissory note against you; I may insert in my declaration, a count or charge, for money lent, and the note is, in itself, evidence to support it; and, in general, where a party has a right to sue on a bill or note, he may also declare for the consideration, for which he received it, as if he had sold goods for it, or done work and labour, or lent money, he may join a claim or count in his declaration, for such goods, work or money, and recover what is due to him, either on proving such consideration, or upon proving the bill or note, under the part of his declaration which sets it forth.

And the bill or note will, of itself, as between the immediate parties to it, be evidence, not only of money lent, but of money

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<sup>(n)</sup> Vid. *Chitty on bills*, Brook-field ed. 97.

paid, or money had and received: thus, if the drawer sue the acceptor, or the payee sue the drawer, or the acceptor of a bill; or the indorsee sue his immediate indorser, of a bill or note; or the payee of a note, sue the maker; these being parties, between whom there is a privity, the bill or note passing directly from one to the other, the plaintiff may declare, in the *common money counts*, the forms of which will be hereafter given, and the bill, note, or indorsement, will, on being proved, be evidence to support such a declaration, as well as the count upon the *instrument* itself. An acceptance is also said to be evidence of an *account stated*, with the holder of the bill. But all this must be understood of the immediate parties, and, as between others, an indorsee, for instance, and the acceptor, drawer, or a remote indorser, the declaration and proof must be confined *strictly* to the bill or note.(o)

But, as between the immediate parties, even a note, not negotiable, expressed to be *for value received*, may, in connexion with proof of a consideration, be evidence under the money counts,(p) though it would be otherwise, if it express no consideration.(q) And it has been decided, that even a note payable in lands, and expressed to be *for value received*, is evidence under these counts.(r)

These considerations are, perhaps, of little importance in a justice's court, except where a note or bill is *lost*, and it is consequently necessary to declare in these general counts, from not being able to describe the instrument, in declaring *directly* upon it. A knowledge of the above distinctions, is, in such cases, therefore, important to a proceeding in any court.

#### 10. OF A BALANCE STRUCK.

This is, where two parties, having dealings together, of any kind, whether it be properly matter of account, or any other description of contract; and they reckon together, and agree on a balance due. The law implies a promise, from the party found in arrear, to pay this balance to the other party. And it is sufficient to declare that "the parties settled, of and concerning divers sums of money, in arrear and unpaid, by the defendant, to the plaintiff; that the defendant was, thereupon, found indebted to the plaintiff, so much, in consideration whereof he promised to pay." The plaintiff is not, in this case, confined in proof, to the *precise* sum, stated in his declar-

(o) Vid. Chitty on bills, Brookfield ed. 278 to 283. 2 John. cas. 5. 8 John. 79. 1 Cranch, 299. 12 Mass. Rep. 172.

(p) 2 John. 235.  
(q) 10 John. 418.  
(r) 2 John. 235.

ation on accounting, but may prove and recover less. (Bull. N P. 129.)

Where two partners settle their accounts, and strike a balance between themselves, this action lies to recover it, especially if there be an express promise to pay such balance. <sup>(s)</sup> And even on a covenant to pay money, where a part is paid by the covenantor, an action will lie, upon an implied promise to pay the residue. <sup>(t)</sup> An award in favour of the plaintiff, is said, in some instances, to be evidence, under a count upon a balance struck, even though void, as an award. <sup>(u)</sup>

The stating, that is, settling an account, is in the nature of a new promise. (1 John. 34.)

#### OF JOINT AND SEVERAL CONTRACTS.

In all the foregoing cases of contract, the parties may bind themselves *jointly and severally*, to their fulfilment, in which cases, they may be *jointly or separately* sued to judgment, for a breach of their contract. <sup>(v)</sup> And, until payment, or other satisfaction of the judgment, by one, proceedings shall in no wise be staid against the other; and this, though there be a dozen or more defendants. But after satisfaction by one, of the principal demand, the others cannot be pursued, except upon the judgment, obtained against them for the costs; and should the plaintiff do more, he would undoubtedly be liable to the party aggrieved, in an action on the case. And if he receives satisfaction of one, before judgment in the other suits, such satisfaction may be pleaded in bar of the other suits, though the costs be not paid. <sup>(w)</sup>

[This case, last cited, which I have cited before, is perhaps of sufficient consequence, to deserve a more particular examination. It settles an important question, in relation to proceedings in separate suits, upon *bills of exchange and promissory notes*, as well as *joint and several contracts*, upon principles, the application of which, to the facts under consideration, was new, and not noticed, I believe, by any reported case of our own.

*Gilmore v. Carr.* (2 Mass. Rep. 17.)—Assumpsit, by the indorsee of a promissory note, against the promissor. The plaintiff, at the same term when this action was commenced, also brought an action against the indorser of the same note, obtain-

<sup>(s)</sup> Vid. 2 Com. on Con. 205. Ante, 49.

<sup>(t)</sup> 12 John. 227. 2 T. R. 483, note.

<sup>(u)</sup> 17 John. 40, per Cur.

<sup>(v)</sup> Vid. 1 Esp. N. P. Gould's ed.

pt. I. 140, & cases there cited.

<sup>(w)</sup> 2 Mass. T. R. 171.

ed judgment against him for the amount of the note, and collected it by execution.

The question was submitted to the court, without argument, whether the plaintiff could proceed in this action also, to a judgment, in order to recover costs.

The opinion of the court was, that he could not; that the payment of the first judgment discharged the note, and formed a complete defence to the present action. That, to be sure, the plaintiff had a right to bring several actions, for the same sum, but it is at his peril as to costs; and a payment, by one party to the note, at any time before trial, is a discharge of the promise. Judgment for the defendant, with costs.

The authority of the above case, came under review in the one which follows, decided by our Supreme Court.

*PIERCE and MORSS against THOMPSON.*

*On demurrer.* Declaration, as of August Term, 1816, by the plaintiffs, as the second indorsees of a promissory note, dated April 5th 1816, payable to the order of *Hugh P. Welch*, for four hundred and seventy-three dollars, ninety days after date, at *The Mechanic's and Farmer's Bank*; endorsed by *Welch* to *Wilber and Fish*, and by them to the plaintiffs.

*Plea, the general issue.*

The cause was carried down to trial, upon this issue, at the April sittings, in the city of New-York, 1817, before his honour Mr. Justice Spencer. The defendant now, interposed a plea *puis darrein continuance*; that an action had been commenced, upon this note, by the plaintiffs, against *Welch*, the payee, as first indorser; that a judgment was rendered for the plaintiff, in that suit, in January Term, 1817, against *Welch*, who had paid the amount of the judgment to the plaintiffs; and prayed judgment if the plaintiffs ought further, &c.

*Demurrer and Joinder.*

*Cowen* in support of the demurrer. The question presented by the pleadings, has several times arisen in the English Courts; but has always come up, on a motion to stay proceedings, upon payment of damages and costs. On motion, in behalf of the indorser, the proceedings will be staid, on his paying the damages and costs, in the particular action, against him; but when the motion is, by the maker of the note, the damages and costs, in all the suits, against the parties to the note, must first be paid. And he cited *Blackstone's Rep.* 749. 4 T. R. 691 Str. 515.



2 Ves. 115. The same doctrine was held in *Pennsylvania*, in *Tarin v. Morris et. al.* 2 Dall. 115.

The maker and indorser, stand in the relation of principal and surety ; and it is important, that the English rule should be adhered to, in order to make the form of the proceeding consist with the rights of the parties. The plaintiff had a right to their action, against both maker and indorser, and an incidental right, to their costs of each action ; but, to allow the defendant's plea, would be to enable an indorser, by tendering the money, before he is sued, or by paying the money into court, afterwards, not only to deprive the holder of costs, in a suit, which he has rightfully commenced against the maker, but to compel a payment of costs, from him to the defendant, upon a verdict and judgment against him. And either of the parties, whose name appears upon the note, having a right to discharge it, would possess the same power, over a suit commenced against another.

I am aware that the case of *Gilmore v. Carr*, in 2 Mass. Rep. 171, will be cited in support of this plea ; but I rely upon *Wattles v. Laird*, 9 John. Rep. 327, as containing a contrary rule, by which this court will be governed. In the last case, the plaintiff was allowed to recover his costs, against the indorser's bail, after his judgment, against the maker, had been satisfied.

THOMPSON, C. J. The recovery there, depended on the form of the contract. The bail were liable for the *penalty*, upon their recognizance, which, being forfeited by a return of *non est inventus*, upon the ca. sa. the plaintiff had a right to his judgment, *pro forma*, for the whole penalty ; and then to collect the costs, as a part of the condition.

Cowen remarked, that the court might, in cases like the one under consideration, equally subserve the rights of all parties, by allowing the plaintiff to take his judgment, *in form*, for the amount of the note ; and restraining him, from the collection of any thing beyond his mere costs, as was done in *Windham v. Wither*, and *idem v. Trull*, 1 Str. 515.

Cushman, contra, relied upon the case, referred to in Massachusetts reports, as containing the true rule on this subject.— He denied, that an action could, in any case, be pursued for the costs, the mere incident, where the principal was discharged ; and he likened it to the case of *Tillotson v. Preston*, 3 John. Rep. 229, where it was holden, that no action would lie for the interest, after the principal of a debt had been paid to, and accepted by, the creditor.

The court evidently inclined, on the argument, to adopt the reasoning of Mr. Cushman ; and the Chief Justice, and Mr. Jus-

*tice Spencer*, both reasoned from the bench, in favour of this plea. Mr. *Justice Spencer*, afterwards, on the day of the argument, informed me at his chambers, that the case in Massachusetts spoke his views. My agent at New-York afterwards wrote me, that at the subsequent October term, judgment was rendered for the defendant. Not having been the attorney in the cause, this was the last I ever heard of it.]

A contract may also be made, to pay, or do, such a thing, to or for, several persons, *jointly and severally*; but still, they must all join in bringing an action, unless their interest be *really* several, as where a certain part is, *in fact*, on the face of the contract, due to *one*, and a *part* to *another*.(x)

Though, if such interest be not *in fact* several, it has been determined, that, if one sue, it can only be pleaded in abatement, and is no good objection on the trial.(y)

#### OF CERTAIN THINGS, WHICH RENDER A CONTRACT VOID

These are 1. *Such as avoid all contracts.*

2. *Such as avoid simple contracts only.*

1. THE CONSIDERATION OF ALL AGREEMENTS MUST BE LEGAL : And all those, which contravene the general policy of the common law, or the positive provisions of any statute, are void. Thus, a contract to pay money for killing, robbing, stealing, committing an assault and battery, trespass, and the like, is void.— So are all contracts, made with a view to settle or compound a criminal prosecution, for felony, misdemeanor, or other public offence. But from this, is excepted all assaults, batteries, and other misdemeanors, done or committed to the injury of the party complaining, not charged to have been done riotously, or with intent to commit a felony, or not being an infamous crime, provided the party injured has a remedy by civil action. These, the party injured, may compound and settle, so as to avoid a criminal prosecution, commenced in the manner pointed out by the statute.(z)

And if I request another to distrain, or impound goods or chattels, or a constable, or sheriff to levy on, and take property upon execution in my favour, or request him to arrest another under certain process, and promise to indemnify against such act; although it is a trespass, yet if the person does not

(x) Vid. 1 Esp. dig. N. York ed. pt. II. 88, & cases there cited. id. 143.

(y) *ibid.* & for more on this subject vid. id. 144.

(z) 1 N. R. L. 499.

know it to be such, I am bound by my promise of indemnity. (a) And so, where a commissioner, and an overseer of highways, ordered a man to remove a gate from across a turnpike road, supposing it to be a nuisance : and the overseer promised to indemnify against such act, this was holden a valid and binding engagement, within the above distinction. (b)

Contracts with a view to future cohabitation, or prostitution, are void ; but not so of those to pay for past seduction, or cohabitation.

Contracts for lodgings, for the express purpose of prostitution, are void ; and so for the sale of prints of a libellous tendency.

And so to pay for the use of a billiard table, if the defendant be an inn or tavern keeper ; but otherwise, if the defendant do not keep tavern. (c)

Contracts totally to restrain a man from exercising his trade or profession, either for a limited time, or generally, are void. But a contract to restrain its exercise at a particular place, or places, is valid. So contracts to restrain a person from marrying, either generally, or from marrying any body, except a particular person, unless it at the same time impose an obligation *positively* to marry that particular person, are void. And these two last classes of contracts are void, as being contrary to the policy of the law, which is to encourage both trade and marriages. And for the same reason, contracts, by which one agrees to pay another, for exercising his influence, in order to induce another to marry, are void ; for such engagement ought, above all others, to be free from the bias of fraud and interest.

Contracts are moreover void, which are made for the purpose of engaging another to prosecute, assist, or intermeddle, in prosecuting or defending a suit at law, unless it be with one of the profession duly licensed. But it is lawful for any man to maintain the suit of his near kinsman, servant or poor neighbor, without being guilty of the crime of maintenance, as it is called, though he be not licensed as a lawyer ; and any agreement, touching such assistance, would of course be valid.

And so, if the person prosecuting or defending, have any legal or equitable interest in the subject of controversy. (d)

An agreement with a sheriff, or constable, to suffer a man to escape from any kind of process, criminal or civil, or to pay

(a) Vid. 17 John. 142.  
(b) id.

(c) 13 John. 85.  
(d) 8 John. 220.

him any thing for such escape ; or an agreement that, if he will not take such a man, on any such process, or having taken him, that he shall be paid the money due from him, if he will let him go, or shall have the body by such a time, is void.

So, a note taken by a sheriff as security, on arresting a man, is void, as being contrary to the statute concerning sheriffs.— The sheriff has, in such case, a right to take a bond in a particular form, but no other engagement.(e) But a subsequent promise to refund, to a sheriff or constable, the money which he has been obliged to pay, in consequence of suffering the promissor to escape, though such escape be voluntary, would be valid.(1) But such a promise, made at the time of the escape, would clearly be void ; nor would an action lie for the money paid, without a subsequent promise expressly made.(f)

All gaming contracts are void ;(g) and all securities for money lent to game with, though an action for the money itself lent, on the implied promise, will lie, the law avoiding the security only.(h) So of all contracts for, or on account of a bet upon a horse race, or concerning the same.(i) But wagers, unless prohibited by statute, or tending to excite a breach of the peace, or contrary to the principles of sound policy or morality, are valid.(j) But in order to constitute a legal wager, the event upon which the stake depends, must be uncertain, and unknown to either party.

Fraud in obtaining a covenant, or other contract under seal, will in general form no defence in a court of law, unless it relate to the execution of the instrument, as where one agreement is fraudulently substituted for another ; but for fraud in other respects, the remedy is in the Court of Chancery only.

Any inn holder trusting any person, other than a traveller, for tavern expenses, above the sum of one dollar and twenty-five cents, loses the debt, and any security for such debt is void ;(k) but it lies with the defendant to show that the contract or security was entered into or executed, for tavern expenses, unless the plaintiff state it to be so in his declaration, or prove it in evidence. If this appears, by the plaintiff's own showing, judgment shall go against him, unless he also show that the defendant was a traveller, or otherwise prove him within the proviso in the fourteenth section of the act,(l) by showing that he

(e) 8 John. 98. 1 N. R. L. 423.

(1) 14 John. 378.

(f) 8 East, 171. 14 John. 378.

(g) 1 N. R. L. 152. id. 223.

(h) id. & vid. ante, 81.

(i) 1 N. R. L. 223.

(j) 10 John. 406. Ante, 41.

(k) 1 N. R. L. 180, §. 13.

(l) id.



was, at the time of the contract, a lodger in his house, or a traveller from a neighboring city or town. On the other hand, if the defendant be put to prove, that the consideration of the contract was tavern expenses, he must also show, that he was not within the exception or proviso of the act.(m)

It has been decided by several respectable tribunals, that a contract made on Sunday, is void ; and the learned Judge Rush, president of the Court of Common Pleas, of the first district of Pennsylvania, in *Morgan v. Richards*, (n) lays it down expressly, as a general rule of the English common law, independent of any statutory provision, that all contracts made on Sunday are void, in which opinion the court concurred. The statute of Pennsylvania, in relation to keeping Sunday as holy time, is recited in that case, and appears substantially to agree in its provisions with the first section of our own.(o) A similar decision appears to have taken place, in the Superior Court of Connecticut.(p) If this be the true rule, all contracts made on Sunday, except such as are expressly tolerated by our statute, may be considered void. But this only extends to the solar day, i. e. between sunrise and sunset, of the first day of the week.(q)

For the doctrine, in relation to illegal contracts more at large, vid. 1 Com. on Con. 31 to 46, and the authorities there cited.

*Usury* is often set up as a defence, in an action upon contract. And its frequency in a justice's court, as well as in all other courts, seems to invite a consideration some what more particular, than many other topics.

By the act to prevent usury,(r) it is provided, that no person or persons whomsoever, shall take, directly or indirectly, for loan of any monies, wares, merchandize or other things whatsoever, above the value of seven pounds for the forbearance of one hundred pounds, for one year, and so after that rate, for a greater or less sum, or for a larger or shorter time ; nor take any bond, bill, note or security whatsoever, for the payment of money to be lent, or to be due or payable, by any means whatsoever, whereupon, or whereby, there shall be reserved or taken, or included above the rate of seven pounds, in the hun-

(m) 3 Caines, 187.

(n) Brown's Pennsylvania Rep.

(o) 1 N. R. L. 193.

(p) Swift's system, vol. 1. p. 367.

But vid. 1 Taunt. Rep. 131, & 10 Mass. Rep. 312, *contra*.

(q) 2 Connecticut Rep. new series, 541. id. 560, *per* Gould, J.

(r) 1 N. R. L. 64.

dred as aforesaid. And further, that all bonds, bills, notes, contracts and assurances whatsoever, and all deposits of goods, or other things whatsoever, for payment of any principal or money to be lent, or covenanted or agreed to be paid, upon or for any usury, whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken, above the sum of seven pounds in the hundred as aforesaid, shall be utterly void.

By the next section, the party who pays usury, may recover back the excess beyond legal interest, by suit commenced within one year from the time of payment; and, if his suit be not commenced within that time, the action is given to a common informer, the one half, when recovered, to go to his own use, and the other to the use of the poor of the town, where the offence was committed.

There is also by this section, an easy and general mode of declaring, pointed out for the party who pays the excess; but this form of declaration is not the proper one for a common informer. He must declare specially, as in other cases, stating the facts as they are, and alledge that the debtor has not sued within the year.<sup>(s)</sup> In this action by the informer, the borrower is himself, a competent witness to prove the usury and payment.<sup>(t)</sup> This action, by an informer, is limited to one year after the borrower's neglect to prosecute on his part.<sup>(u)</sup>

The statute applies merely to a loan or forbearance of money or other thing, to be returned in kind, and not in specie.— Thus, it does not apply to the letting or hiring a horse, or other thing to be returned. But a loan of a horse, wheat or other thing, upon a contract to return another horse, or wheat, or another thing of the same kind of equal value, or more than equal value, with a compensation of more than at the rate of seven per cent. per annum, for the use of it, would be usurious.<sup>(v)</sup> The forbearance may be, either for a loan, or upon some other debt, not arising directly upon a loan; or rather, as some writers will have it, all debts may be construed into, and considered equivalent to a loan.<sup>(w)</sup> For, say they, every debt is just the same, as if the creditor receives the price, and then hands it back to the debtor upon loan. The loan is the contract.<sup>(x)</sup> Forbearance is properly giving a further day for its fulfilment.<sup>(z)</sup>

(s) 7 John. 402. 8 id. 218. S. C.

(t) 1 Caines, 163.

(u) 1 N. R. L. 64, 5.

(v) Ord on usury, 28. Kirby's

Rep. 60.

(w) Ord on usury, 28, 9.

(x) id.

(z) id. 23.

The lending of money, to be replaced upon an uncertain event, which may never happen, with a charge of more than seven per cent. is not usurious : as upon the return of a ship, or if such an one, an infant, shall arrive at twenty one years of age. But this must be where the risk is a part of the contract, and one of its essential properties.(a)

*Interest* is a certain profit, which the lender is to have for the use of the loan (b) And the amount of interest shall be regulated by the law of the state or country, where the contract is made,(c) unless where the parties reside in one state, and go to another and contract collusively to evade the law of the state where they reside.(d) But after judgment, it will in all cases, carry interest, only according to the law of the place where judgment was rendered.(e) A contract, that when interest grows due, it shall be turned into principal, and draw interest, making interest upon interest, will not have the effect intended ; though it is not usurious, so as to avoid the whole contract.— The only way of turning interest into principal. is to settle the balance of interest, when it becomes due, and add it to the principal, by a new agreement.(f) And an agreement to pay a certain sum in gross, if the principal be not paid at the time appointed, or a certain sum per annum, beyond seven per cent. until the principal be paid, the debtor having it in his power to discharge himself of such extra payment, at any time, is not usurious.(g)

To constitute usury, there must be a corrupt agreement, that is to say, the parties must both know that there is usury, and their minds must meet upon it ; for where more than seven per cent. is reserved upon a contract, by mistake of the writer, or with the knowledge of only one of the parties, it is not usurious.(h) And even though the mistake be discovered by the lender, before he has received the security, if after he has advanced the money, the contract is valid notwithstanding.(i)— And it is the same, whether the writer's mistake be of fact or of law.(j)

Whether the premium be in money or other thing, it is equally usurious.(k)

(a) id. 24 & 5, 39 to 48.

(b) id. 29.

(c) id. Hartford ed. 1809, p. 32, 3, & note (d)

(d) id.

(e) 2 Burr. 1094. 1 Blac. Rep. 267.

(f) Ord. on usury, 36, 7.

(g) id. 49 to 53.

(h) id. 38. 3 Day's Rep. 268. 1 Root's Rep. 303. Cro. Car. 501. Freem. 264, pl. 286. 2 Ventr. 107.

(i) 2 Ventr. 83.

(j) Cro. Jac. 677. 2 Roll's Rep. 414.

(k) Ord. on usury, 48.

A reservation of interest quarterly, or half yearly, is not ~~usu-~~rious, nor would a deduction; or discount of the interest at the time of the lending be so.(1) And, although a note, drawn to be discounted at an usurious rate of interest, be void; yet, if it be valid in its origin, it may be sold, and even indorsed by the payee, at a discount of more than seven per cent. and this will not, under any circumstances, vitiate it in the hands of the holder, or prevent his bringing an action upon it.(2) And where a note, valid in its commencement, was afterwards indorsed at twelve per cent. discount, and the maker afterwards gave a note, with others as sureties, to the indorsee, for the whole amount of the first note, including principal and interest, although it appeared, that the parties to the original note, both maker and indorser, were either of them perfectly able to pay it, and that known to the indorsee, yet it was holden, that the payee might, notwithstanding, recover upon such substituted note.(3) But the contrary of these two last cases, has been holden on great deliberation, by the Supreme Court of Errors in Connecticut, who have decided, that the transfer and sale of a note, at a discount beyond the legal rate of interest, the parties being able to pay, and of unquestionable responsibility, and that known to the holder, would authorize a jury to pronounce such transfer void for usury, and the contract of indorsement, or other transfer, would not enable the holder to maintain an action.(4)

A creditor is not allowed to make it a condition of the loan, that he shall receive a compensation for his services, in procuring the money;(m) or that the borrower shall take turnpike stock, or other property, and include it in the debt, at an advanced value.(n) So, where I give you my note of fifty dollars, to be discounted, in order to raise money, and take yours at the same sum, with a commission of 2 1-2 per cent. included, as a compensation for my becoming security; this note is usurious and void.(o) Nor will the usage of trade alter the case, though it seems I may receive a commission for becoming your security; and the practice of banks in issuing post notes, is not in itself usurious.(p) And in the exchange of my note for yours as above mentioned, if your note has, in fact, some time to run, without interest, and the commission does not exceed,

(1) id. 54, 5, & 1 5 John. 162.

(2) 15 John. 44.

(3) Garret v. Beach, et al. M. S. in Supreme Court, May Term, 1819.

(4) 2 Connecticut Rep N. S. 175  
vid. ante, 135.

(m) 1 John. Ch. Rep. 6.

(n) id. 536. 7 John. 196.

(o) 13 John. 40. 16 John. 367.

(p) id. ibid.



or even falls short of the legal interest, your note would clearly be valid and binding. (g)

Various pretences are frequently resorted to, by usurers, in order to evade the statute against them.

The prominent ones are, 1. By adding a colourable risk.— For instance, making the repayment depend on the life or death of some person, in order to bring it within the distinction before stated.

2. By lending under a pretence of sale of goods, fixing an enormous price, and making it a part of the principal debt.

3. By lending stock, or money in the funds, and charging interest on more than the market price of the stock, or funded debt.

4. By advancing money on a pretended partnership, and receiving usury, under the head of partnership profits; in consequence of the law having pronounced a partnership in good faith, not usurious, however large the profits, though the interest of one partner may be a mere advance of money.

5. By reserving interest as rent, on a lease to the borrower, at a very high rent.

The circumstances generally relied on, to prove these shifts and subterfuges have been,

1. The slightness of the hazard, where the loan is put in hazard.

2. Communication for a loan.

3. Inadequacy of price, on re-purchase of goods, &c. where the usurer, after having sold them, at an exorbitant price to the borrower, procures them to be re-purchased by some person, who is privy to the fraud, at less than their real worth, which is a subterfuge we had not before mentioned.

4. Exorbitance of price on a sale.

5. Power of re-purchase.

6. The distresses of the borrower.
7. The form of the security.
8. The subsequent acts of the parties.(r)

The force of all, or any of the above circumstances, is a subject for the jury, (or a justice sitting in their stead,) to determine. And if satisfied, that a real loan or forbearance on usury was intended, however subtle the invention to disguise it, it is their duty to say so, whatever may be the legal consequences.

All promises, agreements and contracts, whether written or verbal, upon an usurious consideration, or in other words, with a view to obtain more than legal interest, are void, into whatever hands they may come. But judgments, including usury, are not void, though if entered up on confession, by virtue of a warrant of attorney, it may be set aside on motion, upon the ground that the warrant of attorney is void; and so, probably, if the defendant should confess in person. It is however said, that if such judgment be assigned to a third person, for a valuable consideration without notice of the usury, the court will refuse the rule to set it aside.(s) I am of course, here speaking of a court having power to control or set aside its judgments on motion; which I suppose is not the case in a justice's court.— I know of no way to set aside such a judgment, in the court of which I am treating, unless it be by *certiorari*, and assigning the usury in the court above, as an error *in fact*, as is done for any other irregularity, or error, which did not come under the justice's observation.(t) But where a judgment is obtained by a regular proceeding, in the ordinary way, without collusion, it is conclusive, though the subject matter upon which it was rendered, may be usurious. And a note, given as security upon such a judgment, is valid.(u) The creditor who sues upon a contract, in the least affected with usury, whether it be written or verbal, is subjected to the loss of his whole debt, for all is void, and as though it had never been. But where the money has been paid, the excess only can be recovered back.(x)

If the contract to pay money, or other thing, be fair and valid in its creation, not having been made for usurious purposes, any subsequent agreement of forbearance upon usury, or any other usurious transaction, would not avoid it, though the usu-

(r) Vid. Ord on usury, 64 to 88, & cases there cited.

(s) 2 John. cas. 268. 1 John. Rep. 521. Note. S. C.

(t) 15 John. 87.

(u) 2 Caines, 150.

(x) 1 N. R. L. 65.

ry paid, might be recovered back.(y) And where a valid contract is taken up, and an usurious one given, as a substitute, the second one being void, the first remains binding, and may be sued upon.(z)

A subsequent security, taken by the creditor, or any one claiming under him, *not bona fide*, as a substitute for an usurious contract, or any part thereof, or as security for fulfilling the same, or any part thereof, or indeed in any way connected with, or dependant upon it, follows the fate of the first, and is absolutely void (a) But where I become bound for you, to pay an usurious debt; and you agree to indemnify me, you are bound by such counter agreement.(b) And where I lend you money on usury, and to pay me you become bound to A, whom I justly owe, A, being ignorant of the usury, such contract in the hands of A is valid.(c) And where a mortgage is given, on an usurious consideration, a *bona fide* purchaser, under the mortgagee, will not have his rights, as such purchaser, impeached for the usury.(d) But it would be otherwise, if he had notice of the usury, gave no consideration, or was not a *bona fide* purchaser, in every other respect.(e)

It is provided, by the "act to prevent abuses in proceedings before justices of the peace,"(f) that no justice of the peace, or constable, shall directly or indirectly buy, or be interested in buying, any bond, bill or promissory note, bill of exchange, book debt or other chose in action, for the purpose of commencing any action thereon; nor shall any justice or constable, by himself, or by or in the name of any other person or persons, either before or after suit brought, either lend or advance, or agree to lend or advance, or procure to be lent or advanced, any money to any person, in consideration of, or as an inducement to, the placing, or having placed, in the hands of such justice or constable, any debt, demand, or chose in action, against any other person, for collection.

By the same act, such offence is declared a misdemeanor, subjecting the offender to fine and imprisonment; and the conviction further operates, as a forfeiture of the justice's or constable's office.

By the second section of the same act, it is provided, that the defendant may prove in his defence, in any suit, that the subject of such suit was bought and sold, or received for pros-

(y) 2 Caines, cas. error, 66.

(z) For the above doctrine generally, from note (r) to this note, vid. Ord on usury, 64 to 88, & cases there cited.

(a) 3 T. R. 531. 5 Taunt. Rep. 780. 2 Connecticut Rep. N. S. 276.

(b) Ord on usury, 100.

(c) id. 97, 8. 10 John. 186.

(d) 10 John. 185,

(e) id.

(f) Laws, 1843. 43, c. 159.

ecution, contrary to the provisions of said act. On the trial, the plaintiff or plaintiffs or any other person who may be interested in the recovery, may be examined, on oath, touching the said defence; and if such plaintiff, or other person interested, shall refuse to answer, on oath, any pertinent question, tending to show a violation of this act, or if it shall appear upon the trial, that the subject of the suit had been bought or procured, or any money lent or advanced, upon the same contrary to this act, the plaintiff shall be nonsuited: *provided*, that any evidence derived from the examination of the plaintiff, or other person interested in such recovery, shall not be admitted in proof against them, on any criminal prosecution, for violating the provisions of said act.

And further, the defendant may serve a notice on the plaintiff, at least two days before the trial, requiring him to appear personally at such trial; and in case such plaintiff shall not attend as aforesaid, he shall be nonsuited, in case due proof be made of the service of such notice, unless such failure to attend shall be satisfactorily accounted for by the plaintiff, in which case the trial shall be postponed, from time to time, until such plaintiff shall personally attend the same.

The plaintiff, when he attends, is, by the act, entitled to the same fees, as are by law allowed witnesses in other cases.

The notice to attend, required by the act to be given to the plaintiff, may be in the following form:

JUSTICE'S COURT.

<i>Richard Roe,</i>	}	Before <i>Philip Green</i> , Esq. one of the justices of the peace, in and for the county of Saratoga:
<i>ads.</i>		
<i>James Jackson.</i>		

SIR—Take notice, that you are hereby required to appear personally, at the trial of this cause, on the 14th day of September instant, at 1 o'clock P. M. at the dwelling house of the above named justice, in the town of Saratoga Springs, in said county, in order to your being examined on oath, pursuant to the act to prevent abuses, in proceedings before justices of the peace.—  
Dated the 8th Sept. 1820.

Your's &c.

RICHARD ROE, *defendant*  
*in this cause.*

To Mr. *James Jackson*, plaintiff  
*in this cause.*

This notice should be delivered to the plaintiff personally, if to be found at his usual place of residence. If not, it would



probably be sufficient, within the rules laid down by the Supreme Court, regulating the mode of service in like cases, to leave it at the plaintiff's dwelling house, with his wife, servant or some one of his family.(g) It should also be served at least two days before the trial, exclusive of the day of service; for in all notices, one day is to be taken inclusive, and the other exclusive.(h) So that a notice to appear on the 14th September, should be served, at least, as early as the 12th of the same month. This may be done, although Sunday be one of the days.(i)

As we shall have occasion hereafter to advert to the above rule, and some other rules relating to the computation of time, in proceedings before justices, as well as in execution of process, issuing from a justice's court, we may as well, in this place mention, that, as a general rule, WHEREVER A TIME IS MENTIONED, EITHER IN A STATUTE OR CONTRACT, *to be computed from an act done, or from the date of a contract, or other date*, the day of doing the act, or of the date, is to be included in the computation.(j) And indeed, in one case, this doctrine was extended to a notice required by a statute; for where the expression of the statute was, that no suit should be brought, *until one calendar month next after notice*, the court held this expression satisfied, by a notice on the 28th April, and the issuing the writ on the 28th May, thereby including both the first, and the last day in the computation.(k) But I have considered this application of the rule to notices, as overruled by the broad language of the Supreme Court, in their decisions last cited. This, however, is but an exception, and the rule is left to operate in other cases. The mode of computing time upon a bill of exchange and promissory note, we have seen is another exception;(l) but I do not now remember a third. Thus, in a case, where a lease is to run so many years from the *date*, or a contract is to be performed so many months from the *date*;(m) or where a statute requires an act to be done, within so many months, after the expiration of a sheriff's office;(n) or an action to be commenced, within so many years, after the injury committed, or cause of action accrued;(o) the day of the date, or the act done, must be included in the computation. And the case last cited from Brownlow and Hobart, shows this to be an important rule, with regard to the computation of time, under the statute of limitations generally. So, in computing time *after an arrest*;(p) or

(g) Vid. 7 John. 96. 4 T. R. 465.

(h) 3 John. 261. 5 id. 232.

(i) 3 John. 261.

(j) Vid. cases cited in Woodfall's Land. & Tenant, 163. Doug. 463. 3 T. R. 623. 3 East, 407.

(k) 3 T. R. 623.

(l) Ante, 85.

(m) Vid. cases cited in Woodfall's Land. & Tenant, 163. Doug. 464, 5.

(n) Doug. 463.

(o) 1 Brownl. 156. Hob. 139.

(p) 3 East, 407.

after the making of a lease, (q) the day of the act done is to be included. But the words, *from the day of the date*, and so I suppose *from the day* of any other act done, excludes such day from the computation. (r) But the ordinary, legal import of the above words, may be controlled in all the cases above mentioned; and a different meaning given to them by something appearing in the context of the statute, contract, &c. where they are used. (s)

The space of a year is 365 days, excepting bissextile or leap year, which contains 366 days (t)

A month, in law, is a lunar month of 28 days, of which there are 13 in a year, so that the expression 12 months, in a statute or contract, means only 48 weeks; and if the Legislature in a statute, or the parties to a contract, mean to compute by calendar months, or by a year or years, they must say, *calendar months*, a year, &c. for if they say a month, or so many months, the computation shall always be by lunar months. (u) — Thus, when the statute authorizes a justice to adjourn a cause, for a time not exceeding three months, (v) he cannot overgo the term of twelve weeks. But it is said the expression, “a twelve month,” means a whole year. (w)

In the space of a day, all the twenty-four hours are usually reckoned, and the law rejects all fractions of a day, so as to avoid confusion. (x) This shows that the practice of computing the time of serving a summons, and other similar calculations; from such an hour, to such an hour, of different days, in order to satisfy the time required by the statute, is erroneous, and, in general, when a person is bound to pay money, or do any other act, on a certain day, he has time till twelve at night of that day, after which, the following day commences. (y)

We shall have occasion to apply some of the above rules more particularly, when we come to speak of adjournments, and process, with the time of its return, execution, &c.

DURESS OF IMPRISONMENT, OR DURESS PER MINAS, avoids all contracts. The first is, where a man is illegally imprisoned. — If in consequence of this, he enters into any contract, it is void, though otherwise, upon a good consideration. But this would not be the case, if in consequence of a legal imprisonment.

(q) Hob. 140.

(r) Vid. 2 Salk. 413.

(s) Vid. Woodfall's Land. & Ten-  
ant, 163.

(t) 2 Blac. Com. 141.

(u) id. & vid. 3 John. Ch. cas. 74.

15 John. Rep. 119. S. P. 1 John.  
cas. 100. 7 John. 217.

(v) 1 N. R. L. 389.

(w) 6 Co. Rep. 61.

(x) 2 Blac. Com. 141.

(y) id.

*Duress per minas*, is where a man is threatened with some personal injury, as death, illegal imprisonment, mayhem, assault and battery, or the like. If he contracts under the influence of fears thus excited, his contract is void, though upon good consideration.(z)

The right of pleading *duress*, in avoidance of a contract, is, like infancy, a personal privilege; and I have no right to plead that I entered into a bond or other contract, with, or in behalf of another, on account of duress upon him.(a)

THE CONTRACT OF AN INFANT, a MARRIED WOMAN, an IDIOT, or LUNATIC, may in general be avoided, and in some cases is absolutely void. But an infant may bind himself to pay for necessities, suitable to his situation in life,(b) unless he live with his father or mother, master or mistress, and is maintained by them, in which case even his contract for necessities is void.(c) He can in no case bind himself by a bill of exchange, promissory note, or settlement of an account even for necessities, such contract being utterly void.(d) And, although he may bring an action for an injury done to, or a contract made with him, yet if he settles such injury, or for the violation of a contract, it shall not bind him. But in an action, the payment may be given in evidence, in mitigation of damages, and this even by a co-trespasser defendant, where the infant has received satisfaction from one of the wrong-doers, and given him a discharge.(e) An infant may also bind himself, by a renewal of his promise, on his coming of age. This must be by a *promise*, for a bare *acknowledgment* of the debt is not sufficient.

It was formerly holden, that an idiot or lunatic could not avoid his contract *at law*, upon a maxim, which had grown up, without reason in the opinion of many, *that a man shall not be allowed to stultify himself*. This doctrine is now exploded, and he may, in all cases defend against his contract, on the ground either of idiocy or lunacy.(f)

An idiot is a fool or a mad man from his nativity, and who never has any lucid intervals; or one who is made such by sickness.—A lunatic is a fool or madman, but who has intervals of reason. In either case, persons of this description, having es-

(z) Vid. Bac. Abr. tit. DURESS.

(a) Cro. Jac. 187. 15 John. 256, per Spencer, J.

(b) Vid. 1 Com. on Con. 148 to 170.

(c) 9 John. 141.

(d) 10 John. 37.

(e) 6 Mass. Rep. 78.

(f) 3 Day's Rep. 90. 15 John. 503, & for the above subject of infancy, coverture, idiocy and lunacy more at large, vid. 1 Com. on Con. 148 to 170.

tates are frequently, on the execution of a commission of lunacy from Chancery, consigned with their person and estates, to the custody of a committee, having power to take care of their persons, and manage their estates. In this situation, it is often necessary that suits should be prosecuted in a justice's court, for or against them. For, though an idiot from his nativity, be not liable on his contract ;(g) yet he is answerable in damages, for any wrong he may have committed, the same as any other person. And so of a lunatic. And either of them are thus liable, even after the execution of a commission, and being ordered into the custody of their committee.(h) A lunatic is moreover liable for debts which he has contracted, during a lucid interval, before the commission executed ; and either of them may sustain injuries, or have debts due them, the same as a sane person. An idiot must sue or defend in person ; otherwise of a lunatic, for he may appear in person or by attorney, if of full age, and if not, by next friend or guardian, the same as in other cases.(i) And in all these cases, the committee or some other proper person, may be joined with him, when either plaintiff or defendant, by the court, to assist in managing the prosecution or defence. And when an idiot or lunatic have no committee, the court may appoint a next friend or guardian, the same as in case of an infant.(j) An idiot or lunatic are subject to arrest and action at law, the same as others, and may be imprisoned on *mesne* process, or execution, or their personal property may be taken and sold upon execution.(k) But from the construction given by the Chancellor, to our statute, in relation to their estates, no execution for debt can reach their lands, after the commission executed.(l) For injuries to the land or crops of the idiot or lunatic, even after he is committed, action must be brought in his own name.(m)

OF CERTAIN THINGS, WHICH AVOID SIMPLE CONTRACTS ONLY.

2. The legal avoidance of simple contracts may be, 1. By FRAUD. The basis of all dealings is good faith ; and though I have agreed to buy an article of a man, in which there is some secret defect, known to him, but unknown to me, but which he conceals, I am not bound to carry the contract into effect, if I find it out before the delivery ; and if not till afterwards, I may

(g) 3 Day, 90. 15 John. 503.

(h) Vid. Bac. ab. tit. Idiots & Lunatics, (E) & authorities there cited.

(i) Id. (G) & cases there cited.

(j) Vid. Cooper's Med. Jurisprudence, 374, 5, 6, & the cases there cited.

(k) 2 T. R. 390. 1 Tide, 184. 4 T. R. 121. 6 T. R. 133. 2 Bos. & Pull. 362. 12 Ves. 385. 13 Ves. 590.

(l) 2 John. Ch. cas. 252. id. 400. 1 N. R. L. 147.

(m) 2 Sid. 125. Hob. 215.



return it, as we have before seen, and sue him for what I have paid.<sup>(n)</sup> The same may be said of any other fraud, deceit or imposition, which he may practice upon me. And although I am thus led to contract, in the strongest terms against myself, as by agreeing to run my own risk as to the goodness of the article, or other subject of our agreement, the whole is, notwithstanding, fraudulent and void.<sup>(o)</sup> Where one purchased goods on credit, which he obtained by a false representation, that he was a merchant in good business, &c. which goods were attached by his creditors, the vendor recovered the goods by replevin, out of the hands of the creditors. (15 Mass. Rep. 156) So goods were recovered by replevin of an infant, who obtained them by a fraudulent representation that he was of age; but afterwards avoided the paying for them by a plea of infancy. (15 Mass. Rep. 359.)

2. With regard to such part of the STATUTE OF FRAUDS,<sup>(p)</sup> as a justice is legally competent to consider, it is proper to notice, that by this statute, *all leases and terms for years, created by parol and not in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases at will only; except all leases, not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts, at least, of the full improved value of the thing demised.*

The term *value*, here means its value in rent or income annually, or for such other time as the rent shall be reserved, and not the *price* of the land demised.

The meaning of the statute, is, that a parol lease for more than three years, or for less than that, at a rent below two thirds of its value, should not operate to create a term or interest in the lessee, for the time mentioned; but still the lessee, under such an agreement, would be a tenant from year to year, on his entering into possession, and as such accountable in an action for use and occupation for the rent agreed upon.— And indeed, such lease is void, merely as to the term, but in other respects, the tenant holds under the lease, though it be for more than three years; and it is valid to regulate, not only the rent, but the time when the tenant is to quit, &c.

The statute also gives the same effect to a lease of an uncertain interest; that is to say, where no term is specified. Such

<sup>(n)</sup> Ante, 57.

<sup>(o)</sup> Vid. Com. on Con. 39.

<sup>(p)</sup> 1 N. R. L. 72. S. 9.

leases, without limitation of time, at an annual rent, are in like manner, leases from year to year.

A lease for three years, by parol, to commence in future, is void by the statute ; but a lease by parol for a year and a half, to commence one year hence, is valid, for it does not exceed three years from the making. And, if land be leased for a year, and so from year to year, as long as both parties please, this is an agreement for two years certain ; and if the lessee hold on, after the two years, he is not a lessee at will, but for a year certain, and such agreement by parol, is valid.

But if the original contract were for a year only, at eight pounds rent, without mentioning any time certain, it would be a tenancy at will, after the expiration of the year ; unless there was some evidence, by a regular payment of rent annually, or half yearly that the intent of the parties was, that he should be a tenant from year to year.(q)

By THE SAME STATUTE.(r) no action lies to charge any executor or administrator, upon any special promise to answer damages out of his own estate, or whereby to charge the defendant, upon any special promise to answer for the debt, default or miscarriages of another person, or to charge any person upon any agreement, made upon consideration of marriage, or upon any contract or sale of lands, tenements or hereditaments, or any interest in, or concerning them, or upon any agreement, that is not to be performed within the space of one year from the making thereof ; unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto, by him or her, lawfully authorized.

It is worthy of remark, in all cases, arising under the 11th section of this statute, the substance of which we have given above, that the promise must not only be in writing, and signed as is therein required ; but it must also be upon a valid consideration in the law, and such consideration must be set forth, expressed or otherwise appear, upon the face of the writing, or it is void equally as though it had been by parol.(s) For the word agreement in the statute, means the consideration, as well as other parts thereof.(t) And be the consideration what it may, though never so valuable, the promise is void unless it be in writing, signed, &c.(u)

(q) Vid. Woodf. Land. & Ten-  
ant, 19, 20, & cases there cited. Vid.  
also Ante, *assumpsit* for use and  
occupation.

(r) S. 11.

(s) 7 T. R. 346. 7. N.

(t) 5 East, 10. 3 John. Rep. 210.  
8 id. 29

(u) 12 John. 291. 4 id. 22.

Very few cases have arisen, giving a construction to the first clause of the above statute, relative to the promise, &c. by an executor, &c. But the second clause, relating to a promise to answer for the debt, &c. of another, has often been the subject of judicial comment, both in England and America. To render such a promise void, there must be a subsisting demand, against the person, whose liability is assumed. I hus, where *John* owes *James* ten dollars, and I tell *James*, that if he will wait upon *John* ten days, I will pay it, and *James* agrees to wait accordingly ; this promise is void, unless in writing, for *John* is still liable as well as I. Or, if I should tell *James* to sell goods to *John*, and that I will see him paid, and he does so, charging them in account to *John*, this promise is void, for the same reason. And so, if I should tell him to sell goods to *John*, and charge it to both, I am not liable. But to make me liable, the sole credit must be given to me, and none at all to *John*. And for this reason, if in the instance above mentioned, I tell *James* that I will see him paid, if *John* does not, this is equally void.(v) But if I order goods or work to be furnished to, or done for another, and engage to pay for it myself, as if I should tell the vendor, " Sir, I will see you paid," this is a sale to me, though the article be delivered to another, by my appointment. The sole credit is given to me, and I am consequently liable, though there be no promise in writing.(w) And here it is plain, that there is no debt against any one, except me. But in the first instances, where there is still a debt against another, or I attempt by parol, to make the debt against another and me jointly, I am not accountable, even though the one in whose behalf I promised, has put property enough in my hands to indemnify me, and for the purpose of paying the debt.(x)

The above distinction between an original and collateral promise, was recognized by a late case on *certiorari*. *Chase*, (whose nephew wished to carry newspapers,) said to *Day*, the printer of a newspaper, " If my nephew should call for papers, I will be responsible for the papers that he shall take." The nephew accordingly took papers, and told *Day* that his uncle would pay for them. The plaintiff made no regular charges, against either *Chase* or his nephew, but kept a mere written memorandum of the number of papers, delivered weekly to various post-riders, and the nephew's name was in the list. It was holden that this was an original undertaking by *Chase*, upon which he was liable ; and that this was never the debt of the nephew.(y)

(v) 6 Mod. 249. 2 T. R. 80. 10 John. 37, per Kent, Ch. J.

(w) 6 Mod. 249, 9. 2 T. R. 80. 17 John. 14.

(x) 12 John. 291.

(y) 17 John. 14. & vid. id. 115. n.

In the above case, cited from the 12th John. 291, the promise, though bottomed upon the consideration, that the original debtor had put his property into the hands of the collateral promissor, was holden void within the statute of frauds. An exception to this rule is, where such property deposited in trust to pay the debt, is either money, or converted into money; in such case the collateral promise is binding. Thus, where A, being indebted to B, gives me the money, or a horse which I sell for the money, to pay his debt due to B, and I promise B to pay him the debt, having the money in my hands, I am liable. (z) And we have before seen, that, though the property is undisposed of, yet where the circumstances will warrant the inference, that the trustee means himself to be considered the purchaser, he makes himself liable for the debt, which the property was intended to discharge (a) And it would seem that in the last cases, an action would lie for money had and received, to the use of the creditor, even though no express promise be made by the trustee to pay the debt. (b) This is on the ground, that here being a trust, created for the benefit of the creditor, even though it be without his knowledge, he may yet affirm it, and then the money becomes due to him. He makes the holder of the money his agent, and the law will infer a promise to him, from the equity of the case. (c) But the law never has supported, either an express promise by parol, or an implied promise in these cases, except where the money has actually been received, or the goods have remained so long on hand, that the defendant might have discharged his duty as trustee, by selling them and obtaining the money. (d) Nor can this class of cases, well be called an exception to the rule, that where the original debtor still continues liable, the collateral promise is void; but it rather appears to range itself under another class, which we shall soon notice, by which it is settled, that where the collateral promise is in consideration of the discharge of the original debt, it is binding, though by parol. Now, in the above cases, does not the creditor clearly say, "the debtor has paid, or caused money to come into the defendant's hands, intended for my use; I therefore accept the defendant, as my agent, consider the payment to him, or rather his receipt of the money, as my own act, and discharge the original debtor?" And can there be any doubt, but that a suit for the money, against the trustee, would have this effect? Unless this would be the result, I confess myself incapable of reconciling this right of the creditor with the long settled distinction, that where the original debt

(z) 3 Harris & Mc Henry's Maryland Rep. 451. 1 John. cas. 205.  
3 Burr. 1886. 2 Wils. 303. vid. also  
7 John. 99. 8 John. 148.

(a) ante, 59.

(b) 1 John. cas. 205.

(c) id. 210, per Kent, J. Cowp. 290.

(d) ante, 59. 3 Harris & Mc Henry's Rep. 451. 1 John. cas. 205



remains, a promise to pay it, though upon good consideration, is void ; but that where the second contract extinguishes the first, the former shall bind, though not reduced to writing.

Accordingly, if I promise to pay *James* for the debt, default or miscarriage of *John*, provided *James* will discharge *John* from all liability, and he does discharge him accordingly, as by letting him out of custody on execution, or giving him a release of the debt, or other act by which his claim is forever extinguished ; there can be no doubt that I am bound by such an engagement, for this is properly an original undertaking, and the debt or claim is thus shouldered by me alone.

Another case, in which I am bound by a parol promise to answer for another, is, where a creditor has a *lien* on goods which he gives up upon the strength of my promise ; as if a landlord have distrained goods for rent, or a plaintiff has attached or taken them in execution for a debt, or a carriage maker has made a carriage, or a tailor a garment, or a tavern keeper has kept horses, having the usual *lien*, for the price of the work, or horse keeping, and I promise either of them, that I will pay the debt, for which they hold the goods in pledge, if they will deliver them up to me, which is done accordingly : in these cases, I am bound by my contract, though the original debt still remain. It is easily seen, to what a vast variety of cases, this last exception may be extended. (Vide 18 John. 12.)

Again. If *James* and I are jointly liable to *John* for a debt, and upon some new consideration I promise to pay *John* the whole claim, or any part of it, or a bill of costs incurred by *John* in prosecuting a suit upon it ; I am bound by this promise, for it is not so much a promise to pay the debt of another, as my own original debt.

A promise to pay the debt, &c. of another by parol, and also to do some other act, is void for the whole, the contract being entire.

It has been holden that a parol promise, by the indorser of a dishonoured note, to indemnify the holder, if he will proceed to enforce payment from the other parties thereon, is void without being reduced to writing. (e) But where I promise to indemnify a man, against his becoming special bail for another, and he becomes bail accordingly, this is an original undertaking, and binding upon me. (f) And so, where I promise to guaranty B's note to you, for the price of a horse to be sold by you to

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(e) 2 Esp. Rep. 494.

(f) 10 John. 242.

B, who gives you a note payable to you or bearer, which I endorse *in blank*: this is not within the statute, and you may write a guaranty over the indorsement, and charge me in an action as the guarantor (g) And so, where I agree to indemnify you, if you will subscribe a certain sum, towards a minister's salary, which you do, this promise of indemnity, though by parol, binds me; and in such case, on being sued to judgment upon your subscription, your action lies against me immediately, before either execution upon, or payment of, the judgment. (h)

Forbearance to sue by the creditor, for a certain time, or generally, without specifying any time, is a good consideration to support a promise to pay the debt of a third person, if properly expressed in the writing. (i) And where you refuse to give credit to A for goods, till he gives you a promissory note, stating *for value received*, and I write under the note, "I guaranty the above," and sign my name to it, upon which, you let A have the goods; although this is a collateral undertaking, upon which, if by a parol, I should not be bound, yet my written guaranty shall bind me; for though it be true, that no consideration is directly expressed by me, for my undertaking, yet it shall be referred to the *value received*, mentioned in the note of A; and, being all one transaction, there is thus a sufficient consideration to be gathered from the face of the instrument, to sustain my engagement, within the meaning of the statute of frauds. (j) Such a paper imports one original entire transaction; for a guaranty of a contract implies, *from the force of the term*, that it is a concurrent act, and part of the original agreement. (k) Hence, the plaintiff may declare, if he chooses, on the contract itself, without troubling himself about the original consideration, and recover as in ordinary cases, by a simple proof of the instrument.

In considering these cases, arising under the statute of frauds, we should be careful not to confound a promise to the creditor, to pay the sum due to him from his debtor, with a promise to the debtor, to pay and discharge the debt, which he owes to his creditor. This last case steers altogether clear of the statute of frauds. And therefore, where I deliver money or goods or other thing to a man, or cause such delivery to be made to him by another, and he, in consideration thereof, or upon any other consideration moving between us, promises me by parol, to discharge my debt due to A, this is a good

(g) 13 John. 175, & vid. ante, 105.

(h) 17 John. 113.

(i) 4 John. 287.

(j) 8 John. 29.

(k) id. 40, per Kent, Ch. J.

promise to me, upon which I may maintain an action, on default of performance.(l)

And indeed, in the case of *Olmstead, v. Greenly*,(m) I understand the Supreme Court, as going still further, and sustaining an action upon a promise direct to the creditor, to pay him the money due from his debtor, in consideration of goods, which the creditor had caused the debtor to deliver over into the hands of the defendant; and they say that it was the same, as if the plaintiff had delivered his own goods, to the defendant as the consideration of the promise.(n)

The statute, which makes a parol promise in consideration of marriage void, is confined to promises of *money*, or other valuable thing, and does not extend to mutual promises *to marry*. But where a man by letter, promises to give such a fortune with his daughter, to B, who marries her upon the faith of the letter, this is a sufficient writing, to take the case out of the statute of frauds. But a letter merely stating a negotiation, not concluded, about a certain sum to be given to the plaintiff, in consideration of his marriage with another, will not have this effect.(o)

As to a parol agreement for the sale of lands, tenements, &c. or any interest in or concerning them, decisions have fluctuated some, on the question, whether a sale by parol of standing timber, crops and other things attached to the freehold, is a sale of *an interest* in lands, so as to require a note in writing. But they have finally resulted in this distinction; that where any thing fixed to the freehold, as timber, grass or other crops, mill stones, gravel or other soil, buildings, fences or other fixtures, are by the agreement of sale to be severed, and are in a state of readiness to be so severed, and are capable of being separated from the freehold without violence; they are treated by the parties, as personal property, and are to be so considered in law, and are transferrable in the same manner as goods, wares or merchandize. This is, where the timber, grass or other crops, are grown, and ready to cut, or at least, are *to be so cut*, immediately, by the agreement. But where the timber crops, &c. are young and not fit to cut, and they are not by the agreement to be cut in their then state, or where the

(l) 2 East, 325. id. 332, per Lawrence & Le Blanc. Js. 17 John. 12.

(m) 18 John. 12.

(n) For the most of the English cases, settling and illustrating the above doctrine, as to promises by

executors, &c. and collateral promises, to answer the debt, &c. of another, vid. 1 Com. on Con. ch. IV. p. 47 to 72.

(o) Vid. id. 72 to 75.

fixtures are sold, without a contemplation to sever them from the freehold, they are to be deemed *an interest in* or concerning lands, and a contract of sale, must be in writing. (p)

A parol agreement to pay for the improvements upon lands, is binding : as where you deliver up the possession of a farm to me, and I agree to pay you twenty dollars for the improvements thereon. (q) But it is otherwise if you entered wrongfully, the land belonging to me ; because in such case, there would be no consideration to support a promise, written or parol. (r) This last case is, however, wholly independent of the statute of frauds.

An agreement by parol, to pay for writing or causing to be written, the conveyances of lands or tenements, is valid. But where a parol agreement is made for the sale of lands, and the vendor is ready at the time appointed to complete the sale, with a deed drawn and acknowledged, pursuant to the bargain, but the vendee refuses to complete the sale on his part, no action lies for the expense of writing the conveyance, or other incidental charges, the agreement to sell being void ; and the conveyance being a mere incident, must follow the fate of the principal agreement, but if the writing had been drawn, on the defendant's promise to pay for it, in case he chose to be off ; this would have been a contract distinct from the agreement of sale ; and an action would have lain upon it. (s)

*Parol agreements not to be performed within a year.* These agreements are not void, unless by their *very terms*, they are not to be performed within a year. Thus an agreement to work a year or more, to pay money or do some other act, at some time, at or beyond a year from the time of the contract, is void. But, if the agreement *may be performed* within the year, as if it depend upon the happening of a particular event, which *may or may not* take place within the year, no note in writing is necessary. Thus, if a man promise another by parol, to pay him ten dollars, on his marriage, or on his return from Europe ; whether he marries or returns, within a year from the time of the contract, or not, the promissor must pay the money, on the event happening. And where A promised by parol, to pay B two dollars a year, for his services as a preacher, though this promise might be void, yet, where it appeared, that the defendant had paid for several years, half

(p) 11 East, 362. 3 Day's Rep. 476. & vid. also 1 Com. on Con. 75 to 80.

(q) 11 John. 145.  
(r) 5 John. 272.  
(s) 16 John. 151.



yearly, it was holden that the jury might infer a promise, by the defendant, to pay by half yearly instalments, and thus steer clear of the statute of frauds. And the Supreme Court here,<sup>(1)</sup> lay down the English rule above noticed, that the agreement, to come within the operation of the statute, must be *expressly extended* in performance, beyond the year. And if it *may be* performed within the year, the act does not apply.<sup>(i)</sup>

The following case should have been noticed before, under its appropriate head of *debt* or *assumpsit*, upon *judgment*, for either *debt* or *assumpsit* will, in general, lie upon the adjudication of an inferior court. As this case is instructive upon several points of frequent occurrence before justices, I give it at length. It will be found in 9th John. 367.

WALLSWORTH *against* MEAD AND GREEN.

In error, on *certiorari*, from a justice's court. *Mead* and *Green*, as overseers of the poor of the town of *Norwich*, brought an action of debt against *Wallsworth*, before the justice, to recover 25 dollars, on an order of bastardy, made by two justices of the peace, the 18th of *September*, 1801, which required *W.* to pay the weekly sum of 75 cents to the overseers of the poor, for the first year the child should be chargeable to the town, and 50 cents for every week thereafter, that the child remained chargeable. The plaintiffs demanded 75 cents a week, from the date of the order to the 10th of *May*, 1811. The defendant pleaded the general issue, and, specially, that no suit would lie on the order, it being illegal and void. The order, which was produced and read, directed the defendant to pay the weekly sum of 75 cents for 12 months, provided the child was so long chargeable.

The defendant produced in evidence a recognizance, dated the 28th *August*, 1810, taken for his appearance at the next general sessions of the peace, to abide and perform such order and orders, as should be made pursuant to law. He also gave in evidence another recognizance, taken at the sessions, in *October*, 1810, for his appearance at the then next sessions. It appeared from the record of the court, that the defendant, at the sessions in *January* following, was discharged from his recognizance. The plaintiffs objected to this evidence, but it was admitted by the justice.

(1) 10 John. 244.

(i) For the cases constraining this

part of the statute, vid. 1 Com. on Con. 87 to 96.

The plaintiffs then offered parol evidence to explain for what, and how the recognizances were taken and discharged. The defendant objected to such parol proof, but it was admitted by the justice. It was proved, that after notice of the order was served on the defendant, the plaintiffs received notice of an intended appeal from the order, to the *October* sessions. At the sessions, in *October*, the appeal was moved, and objected to by the plaintiffs, for want of sufficient notice in writing. The appeal was continued over to *January*, when the defendant appeared, and refused to prosecute his appeal, and his recognizance was thereupon discharged.

The defendant then objected that the plaintiffs were not entitled to recover, without showing that the child had actually been chargeable. The justice admitted the order as *prima facie* evidence of the child's being chargeable; but said that the defendant might show payment, or that the child had been maintained without any expense to the town. No such evidence was given, and the justice gave judgment for the plaintiffs, for 25 dollars.

*Per Curiam.* The principal objection relied upon in this case is, that no action will lie upon the order in question. The objection is untenable. That order is an adjudication of a court of magistrates of competent authority, and conclusive upon the defendant, unless appealed from to the general sessions. Whether such appeal had been made, or can now be made, were questions not properly before the court. It was enough for the justice that such order was in full force, and not reversed or modified by the sessions. It was equivalent to a judgment that the defendant should pay the weekly sum of 75 cents. The order was *prima facie* evidence of the demand; and it rested with the defendant to show himself exonerated from the payment, in order to avoid the recovery against him. This seems to be the light in which such orders were held by this court, in the case of *Sweet v. the overseers of Clinton*. (3 John. Rep. 26.) The judgment must, therefore, be affirmed.

*Judgment affirmed.*

2 TRESPASS ON THE CASE MAY BE BROUGHT, *secondly*, FOR THE  
COMMISSION OF SOME WRONG.

*Under this division, we shall consider, first,*

### THE ACTION OF TROVER.

This action lies, in all cases, where the personal property of the plaintiff has come to the hands of the defendant by a wrongful or unlawful taking, or by finding, bailment, accident, or mistake; and is afterwards converted to the defendant's use.<sup>(u)</sup>—And where goods are distrained and sold for rent, or other cause, this action lies even against the purchaser, if the distress were unlawful, or unfounded.<sup>(v)</sup> It lies, moreover, for any thing growing upon, or attached to the plaintiff's freehold, against a wrongdoer who not only severs, but actually removes or carries it away; though if nothing be done to it, except the mere act of severing, the remedy should be trespass. (Vide 1 Chitty on pleadings, 149, and cases there cited.)

In order to entitle the plaintiff to this action, he must have a property in the goods and chattels converted. This property is of two kinds, viz. *general and special*. *General property* is, where the goods belong absolutely to one, who is commonly called the *owner*. *Special property* is, where a man holds the goods by *bailment*. The plaintiff, having the general property, may of course bring this action, in all cases of a conversion without his consent, even though they be bailed to another. (11 John. 285.) And so may the bailee, against all persons, excepting the bailor.<sup>(w)</sup> And in general, when the goods bailed are converted by a stranger, either the bailor or bailee may bring this action. But they cannot both have an action, at the same time; and the one first bringing his action, determines the right of the other, who cannot then sue.<sup>(x)</sup> Nor can the bailor have this action, where the goods are bailed for a certain time, which is unexpired when the conversion takes place; for the plaintiff must have, at least, a *right of possession*, which he has not in this instance, wherefore the action belongs to the bailee only.<sup>(y)</sup> A mere naked possessor of goods, without right, may bring tro-

<sup>(u)</sup> Vid. Bac. ab. tit. Trover, (A)

<sup>(x)</sup> 1 Buls. 68.

<sup>(v)</sup> 16 John. 159.

<sup>(y)</sup> 7 T. R. 9. 4 id. 489. 3 John.

<sup>(w)</sup> 12 John. 406, 7.

432.

ver for them, and evidence of his possession will maintain the action, for this is always, *prima facie* evidence of right. But the defendant may always, in such case, defeat the action, by showing on his part, that the plaintiff has not, *in fact*, any property, either general or special; but that a paramount title and right of possession is in a third person, who alone has a right to the action.(z)

A constable or sheriff, having levied on goods, by virtue of an attachment, or execution, has such a special property in them, that he may maintain trover against any person, who, without right, takes them away, either from the officer himself, or any other person with whom they are deposited merely for safe keeping; and producing and proving the execution and levy is enough, without showing a judgment to support it.(a)

Actual possession is not necessary, to maintain this action.— A right of possession is sufficient; as if a man contract to sell or deliver me goods, which he tenders to me, but I refuse to take them; although his contract is discharged, yet the right of the goods passes to me, and I can sue the vendor, or any other person for converting them.(b) And so where a man is indebted to me, and I agree to take certain goods, in satisfaction of the debt; but he converts them, trover lies at my suit against him.(c) But in these cases, the goods must be severed, weighed, laid out, or otherwise particularized by the debtor. For where the goods which I am to receive of the debtor, are mixed with others, as where I am to receive, by delivery of the debtor, articles of manufacture,(d) a certain quantity of coal, mixed with others at the pit,(e) of flax, mixed with other flax at the wharf,(f) or hemp, in the same situation,(g) or skins, to be counted out by the seller, in order to ascertain the price,(h) or indeed, where any act yet remains to be done by the seller, in order to ascertain, and offer the subject of the sale, trover will not lie, because the goods are not identified, and the tender is incomplete. And the true inquiry, in all these cases, is, whether the property has so far passed, and been delivered, as to remain at the risk of the vendee. In the latter case, it is said to be *executed*; in the former, it is merely an executory contract; and if the goods are stolen, or otherwise destroyed, the vendor must abide the loss.(i)

(z) 11 John. 529.

(a) 6 John. 195. 7 John. 32. 12 John. 395.

(b) 2 Root, 55. 3 John. 474. 1 Root, 443.

(c) 1 Buls. 68.

(d) 1 Root, 443, & *vid.* 2 Conn. Rep. N. S. 69.

(e) 3 John. cas. 243.

(f) 2 Maule & Selw. 397.

(g) 5 Taunt. 617.

(h) 2 Campb. Rep. 240.

(i) 15 John. 349.



Another rule, nearly allied to the above doctrine is, that where a manufacturer or mechanic, &c. is employed by me, in manufacturing or building a specific article, for me; if it be out of his materials *alone*, or, if the *principal part of the materials* belong to him, the property of the article is in him, till completed and delivered, but if the principal part of the materials be mine, the property all along continues in me, and it is accordingly subject to execution against us respectively or we may respectively maintain trover for it, under the above rule, if taken and converted. *(j)* Thus, where a mechanic contracts to build my ship, out of materials mostly furnished by me, the property in the ship, both before and after it is finished, belongs to me; and cannot be taken on execution, against the mechanic. *(k)*

And so, where I deliver black salts to a man, to manufacture into pearl ashes, which he does accordingly, and places the ashes in the street, to be at my disposal; if they are converted, I may have this action for them. *(l)*

A mere gift of property, unless there be some act of delivery, will not pass a title to the donee, so as to entitle him to recover for it in any action. *(m)* As if one should say to another. "*I will give you the corn growing in that field;*" unless it be delivered, the donee is a trespasser, if he take it away. *(n)* But a delivery may be inferred by the justice or jury, from circumstances, the same as in other cases. And where a father bought a ticket, which he declared he gave to his infant daughter, E, wrote her name upon it, and admitted the gift, after it had drawn a prize, and said that the prize money was hers; it was held that the jury might infer all the formality, requisite to a gift, and that the prize money belonged to the daughter. *(o)*

As to what constitutes a delivery, *vide ante*, p. 28 & 9.

Trover lies for animals, naturally wild, if tamed, and this, although they may have strayed away, unless they have regained their natural liberty. Under these circumstances, it was holden to lie for wild geese. *(p)* In these animals, the owner is said to have a *qualified* property, as contradistinguished from an *absolute* property, which he has in tame animals. Thus, deer in a park, hares or rabbits, in an enclosed warren, doves in a dove house, pheasants or partridges in a mew, hawks that are fed and

*(j)* 7 John. 473.

*(k)* id.

*(l)* 10 John. 287.

*(m)* 2 Str. 955. 2 John. 52. 7 John. 26. 10 id. 93. 12 id. 188.

*(n)* 2 John. 52.

*(o)* 10 John. 293, & *vid.* 2 Str. 955.

*(p)* 10 John. 102.

commanded by the owner, and fish in a private pond or tring, are the property of the one who has reclaimed them from their wild state ; but they continue his no longer, when they have regained their natural liberty. They do not, however, regain this liberty, merely by being let loose, because many of these animals go and return at pleasure ; and as long as they do so, and do not deviate from their usual time of returning, the private ownership still continues, and the recovery in the 10th John. 102, was on the ground, that the wild geese in question had been tamed, and lost the power or disposition to fly away, and that although they had twice before strayed, this was holden no excuse for the defendant's conversion. The true question seems to be, whether the animal have lost all disposition to return. If so, he may be said to have regained his natural liberty. (q) Bees, when hived, are of this description of qualified property, but the mere finding a bee tree on another's soil, and marking it, does not confer a special property in the person so marking ; but the bees in their then state belong as a qualified property to the owner of the soil where the tree stands. (r) This seems to be upon the general principle, that wild animals also belong to the owner of the soil, in certain cases, *by reason of their inability to get away*, as where young birds are hatched on a man's trees, or conies or other creatures, make their nests or burrows on his land, and have young ones there ; he has a qualified property in them, until they are able to escape, and trover would lie for taking or converting them. (s) But in order to acquire property in a fox, or other wild animal, by hunting him, it is necessary that the hunter actually take him, or reduce him to such a situation by wounds, traps or nets, that he cannot escape. Merely *being on the point of taking him*, though he have chased him with his hounds all day, will not give him such a right as to enable him to recover in an action, against a person who should then step in, and kill and carry him off. (t)

It is proper to remark that the young ones of a tame animal, as lambs, calves, kids, pigs, &c. belong, as a general rule, to the hirer of that animal for a time, unless it be otherwise agreed between him and the owner. (u)

If goods attached, or taken in execution by an officer, be lost or destroyed without his default, trover or other action does not lie for them. (v)

(q) Vid. 2 Blac. Com. 391, 2.

(r) 7 John. 16.

(s) 2 Black. Com. 394.

(t) 3 Caines, 175.

(u) 8 John. 435.

(v) 6 John. 9.

## BY AND AGAINST WHOM THIS ACTION LIES.

TROVER lies for me, against any person, who has taken or received my goods, in any manner, except by a sale from me to him; even though my bailee of the goods may have sold or pledged them to him. The only exception is that of a bill or note, transferred in the fair course of trade. Here the owner cannot recover it, even though it were lost by, or stolen from him.

If my goods are converted, though they are afterwards delivered to, and accepted by me, yet my action lies; and the delivery and receipt, only go to mitigate the damages. Thus, if a man rides my horse, and afterwards delivers him to me, or otherwise exceeds or abuses his right, as a bailee of my property, as by using it, or disposing of it, contrary to our agreement, or keeping it beyond the time for which it was delivered to him, and refusing to deliver it on demand, he is guilty of a conversion in each of these cases, (2) and, though the property is restored, he is liable in this action for the damages; for this abuse of the property, or refusing to deliver it, was an actual conversion in law. (3)

A bailee, in certain cases, has a *lien* on the goods bailed, that is, a right to detain them until a sum of money is paid, either for something done to, or about, such goods, or money advanced on their account. In these cases, unless the money due be first paid or tendered, they may be detained, notwithstanding a demand from the owner.

This *lien* is, either *general* or *specific*. *General*, as where goods are placed in my hands, and the law gives me a right to detain them, until all the money or balances due to me from the bailor, are paid. A factor enjoys this right, against his principal, but this is almost the only instance, though where it is proved clearly and strongly, that a *lien* is understood to exist by the usage of any particular trade, this will establish a *lien*, for the goods are presumed to be delivered with a view to that usage; and so where the parties appear uniformly to have dealt with a view to a general *lien*. But this is rather matter of evidence, to show the intent of the parties, in their agreement; and is not referable to either class of *liens*, *implied* by the law. For it is always competent for the parties to create a *lien* or pledge, by their agreement, to any extent they choose.

(2) Vid. Bac. abr. tit. trover, (E)  
5 Mass. Rep. 104.

Mass. Rep. 105, 6, per Parsons, Ch. Justice.

(3) 6 Mod. 212, 10 John. 162. 5

A *specific lien* is, where the bailee has a right to detain the goods, until he is paid for some thing done by him, to, or about the particular goods bailed to him, and *nothing more*. Thus a carrier may detain, till paid for carrying the goods. An inn keeper may detain a horse, till paid for his keeping, a farrier till he is paid for shoeing the horse, a tailor, till he is paid for making the garment, a miller, till he is paid for grinding corn, a dyer, till paid for dying cloth; and so in all cases, where goods are delivered to be manufactured, repaired, &c. by a professed manufacturer; or mechanic, &c.(4)

An attorney, or solicitor, has a lien upon his client's papers, money, &c. which come into his hands, in the course of his professional business, until his bill for all his services and disbursements, taxed by the proper officer, is paid to him; and this lien continues, though his client become insolvent. And so he may compel the opposite party, against whom he hath obtained a judgment or decree, for his client, or the sheriff, who has the collection or enforcement thereof by execution, first to pay him his bill against his client, for all business done by him; and if the sheriff or party, pay it to another, after notice of the *lien*, he does it in his own wrong, and must pay it over again.(5)

The above *lien* by manufacturers and mechanics, was intended for the benefit of trade only, and a farmer who pastures my cows, horses, &c. cannot detain within that rule, till paid for their keeping; and so of the like cases.(6)

But a person who saves goods from a ship on fire, or otherwise in danger,(w) or goods thrown on shore from the wreck of a ship, has a lien for the salvage.(x) But not so of timber, thrown loose by the flood, and washed down stream. In this case the one who saves it, has no lien for his salvage,(y) though it be a navigable river, communicating with the sea. And so of any other case of finding and preserving goods. And it is extremely doubtful at least, whether the finder and preserver can even maintain an action for his services.(z) And on the same principle, where a pointing dog of the plaintiff, strayed into the defendant's possession casually, and continued there twelve months, and he refused to deliver him, unless twenty shillings were paid for his keep, it was holden that he had no lien for this charge, and that trover well lay upon the refusal.(a) I confess that our Supreme Court, in *Amory v. Flinn*,(b) seem to counte-

(4) Vid. Bac. abr. tit. trover, (E)

(5) Vid. id. tit. attorney, (E) ante, 36.

(6) Cro. Car. 271.

(w) 1 Ld. Raym. 393.

(x) id.

(y) 2 H. Bl. 254.

(z) id. 2 Bl. 1117. 2 H. Bl. 258, 9, per Ld. Ch. J. Eyre.

(a) 2 Bl. 1117.

(b) 10 John. 102, 3.



nance a different doctrine, viz. that the finder and preserver of an estray, may detain it, till amends are tendered, for his expense incurred, but nothing more ; and they rely upon 1 Roll. Abr. 879. c. 5, Noy's Rep. 144, & Salk. 686, which appear to bear them out in this doctrine. So that the case of the pointer in Blackstone, may, perhaps, be considered as overruled ; and I think further, that some of the remarks of Eyre, Ch. Justice, in 2 H. Blac. 258, may be considered as of doubtful authority at least, and perhaps as overruled, in relation to *stray animals* at any rate, by the strong intimation of the Supreme Court, in *Amory v. Flinn*, *That, if the person who takes an estray, and keeps it, is put to necessary expense in securing it, such expense ought to be refunded ;* which expression seems to extend the recompense, as well to the trouble of taking and securing, as the expense in keeping, and one would infer from the case, that the law creates a lien for the whole trouble and expense of both. As the above points were not however directly before our Court, in the case mentioned, they may still be considered unsettled.

An inn keeper may detain a horse, till paid for his keeping, whether the owner be an actual guest at his house or not ; and so he may detain the goods of his guest till his reckoning be paid. (c) But in either case, if he let them depart, he loses his lien, although they are again returned into his custody ; nor can he in any case detain one horse for the keeping of another. — But he can detain a horse for his own keeping, even though the horse be stolen, and delivered to him without the consent of the owner. (d) And after the horse has eat out his value, he may have him appraised and sold, or take him himself at the appraisal. (e) But this is otherwise, with regard to articles which do not eat, or occasion any expense in their keeping, for there, though a man have a lien, he cannot appraise and sell. (f) But the above right of inkeepers is confined to them alone, on the ground that they are obliged to receive the guest, and his horses ; but does not extend to a livery stable keeper. (g)

Nor can a person detain, where there is a special agreement to pay so much for the services done, to, or about, the goods, as six pence a day and night, for keeping a horse at an inn ; (h) or where the plaintiff, a farrier, agrees to cure a mare for a certain sum. (i) And the reason is, because, by exacting a special promise to pay, the bailee relied upon that, and did not look to the lien.

(c) Vid. Jac. L. D. tit. *inns*. Salk. 388.

(d) id. & vid. 1 Str. 557. 2 Brownl. 254. 3 Buls. 263, 9, 1 Rolle's Rep. 449.

(e) Yelv. 66, 7.

(f) id.

(g) 2 Esp. dig. N. York ed. 195.

(h) Yelv. 66, 7.

(i) Say. Rep. 224.

Trover will not lie by one tenant in common, or joint tenant, against the other, for the common or joint property, *(j)* or the property, being severable, has been divided, unless he destroy, or sell, or lose it, *(k)* nor can one of several joint tenants, or tenants in common, sue another, for the deeds, leases, or other papers relating to their joint estate. *(l)* But though a sale of the whole, by one of the tenants, *(m)* be a conversion, yet a sale of his individual share is not so. *(n)* Trover will lie by one joint tenant, or tenant in common, for an undivided part of a chattel, against a stranger who converts it. *(4 Campb. Rep. 272.)*

And note, a joint tenancy is, where two or more persons acquire their title to a thing, either in possession or action, at the same time, by the same conveyance, each taking the same interest, and holding by the same undivided possession. A tenancy in common is, where the possession is undivided, but all, or any, of the other requisites to a joint tenancy, are lacking. In a joint tenancy, if one of the owners die, the right survives and goes to the other tenants, but not so of a tenancy in common. *(o)* Choses in action holden, or owned, by several persons, in undivided proportions, are almost invariably holden in joint tenancy, and survive; and the goods or choses, both in possession and action, of partners, are holden in joint tenancy. *(p)* But the right of survivorship, in the case of partners, is denied in a court of equity, as being injurious to trade.

Trover lies for choses, either in possession, or in action; and the assignee of a chose in action may maintain trover for it. For instance, the assignee of a bond. *(q)* And it lies, either against the obligor, promissor, &c. of the chose in action, who has taken and converted it, or against a stranger, who has done so. *(r)*

Thus it will lie for a note, bill of exchange, or other chose in action. *(s)* But in the case of a bill or note, the plaintiff must not only prove that he was once the owner of the bill or note, but he must also show that the defendant came by it unfairly. *(t)* And so note the diversity, between this case and that of trover in general, in which it lies with the defendant, to show a title out

*(j)* 2 John. 468.

*(k)* 3 id. 175. id. 178, per Spencer, J. 2 Caines, 166.

*(l)* 12 John. 484.

*(m)* 3 John. 175. 3.

*(n)* 2 id. 468.

*(o)* Vid. 2 Blac. Com. 130 to 137, 191 to 195, also p. 399.

*(p)* Vid. Watson's L. of partnership, 20.

*(q)* 12 John. 434.

*(r)* 12 John. 484.

*(s)* 3 John. 432.

*(t)* 2 Campb. Rep. 5.

of the plaintiff, after the plaintiff has shown himself once the owner.

But where I deliver a note to my creditor, to receive and apply the money on my debt; this passes the property of the note, and precludes my recovering it in trover.(u) And where I have paid a note, and my creditor still refuses to deliver it up, trover or any other action will not lie at my suit; for the note is worth nothing, and besides this, I have no title to it.(v)

On the mortgage of a chattel, if the condition be forfeited, the title of the mortgagee is absolute, so that the mortgagor cannot, by tendering the money, as in case of a pledge, entitle himself to an action of trover, against the mortgagee, for refusing to re-deliver the property.(x) Nor will the action lie, though the mortgagee sell the property mortgaged, even before the time for redeeming, unless the money be afterwards tendered, at the very time appointed by the mortgage to redeem (x)

#### WHAT SHALL BE CONSIDERED A CONVERSION.

If a man take my goods unlawfully, this is in itself a conversion, for which an action lies immediately.(y) And so if he receive it lawfully, but sell, destroy, or otherwise convert it, he is liable immediately.

But in all other cases, where my goods come lawfully to a man's hands, and I wish to bring this action, I must first demand them, and then the refusal to deliver is evidence of a conversion.(z) A personal demand is not necessary, but a demand in writing left at the defendant's house has been holden sufficient; (a) though a verbal demand of the wife or servant is not so. (6 John. 44.) And a demand of *payment* or *satisfaction* for the goods is a proper demand, as well as a demand of the goods themselves.(b) And the admission of the defendant, that he had the goods, but they are lost, is sufficient evidence of a conversion.(c)

A conversion must be proved, at a time *before* the action commenced, and a demand and refusal or other conversion *afterwards*, will not sustain the action.(d)

(u) 12 John. 346.

(v) 3 John. 432.

(w) 8 John. 96.

(x) id.

(y) 1 Sid. 264.

(z) Cro. Car. 362. 6 Mod. 212.

(a) 1 Esp. Rep. 22.

(b) 1 John. Cas. 406. 1 Esp. Rep.

(c) id.

(d) 6 John. 44.

A promise to return the goods, but a neglect to do so, is sufficient evidence of a conversion.<sup>(e)</sup> So an abuse of a possession originally lawful, or a breach of the trust under which the defendant received the property :<sup>(f)</sup> and the principle is the same, with regard to a chose in action, as to a chose in possession.<sup>(g)</sup>

To constitute a conversion, it is not necessary to show a manual taking of the thing, or that the defendant has applied it to his own use ; but the assuming a right to dispose of it, or exercising a dominion over it, to the exclusion, or in defiance of the plaintiff's right, is a conversion.<sup>(h)</sup>

A refusal to deliver, however, is not *always* evidence of a conversion ; as if I should refuse to deliver a stick of timber, lying upon my land, but lay no claim to it, nor ever intermeddle with it ; this would not be evidence of a conversion.<sup>(i)</sup> And so, if I should refuse to deliver goods which I had found, in order to satisfy myself of the true owner, or that the person applying for them, was properly empowered ; or where I refuse, on the ground of not knowing the person who applies.<sup>(j)</sup> So, where a lease is demanded of me, and I reply, " it is in the hands of my attorney, who has a lien upon it for a small sum of money," this is not evidence of a conversion, if the fact be true ;<sup>(k)</sup> for, to make a refusal evidence of a conversion, the party should have it in his power to make delivery.

If the plaintiff, in this action, recover the value of the goods in damages, the property in the goods, thereupon vests in the defendant, by operation of law.<sup>(l)</sup>

*Thirdly.* OF THE ACTION OF TRESPASS ON THE CASE, PROPERLY SO CALLED.

The general nature of this action is, that it lies for injuries merely consequential, unaccompanied with force for if direct and forcible, the action should be trespass. ; And sometimes, though the act may be not only peaceable, but lawful in itself, yet if it produce any injury to another, this action lies. As if I put up a water spout, on my own lot, which throws the

(e) 3 John. 445.

(f) 10 John. 172.

(g) id.

(h) 7 John. 254.

(i) 2 Buls. 310. 2 Med. 245.

(j) Per Coke, Ch. J. 2 Buls. 312.

1 Esp. Rep. 83.

(k) 1 Campb. Rep. 439, & vid.

also 3 Campb. Rep. 215. N.

(l) 2 Stra. 1078. 6 John. 168.



water into my neighbour's yard and injures him ;(n) or shoot off a gun, by which a man's horse is terrified, and throws him, or runs away with him in his carriage, and breaks it. But if I drive my cart *against* his carriage and break it, the action should be trespass,(n) even if it be in the dark and done by mistake, in my driving the wrong side of the road.(o) And so, the action should be trespass, and not case, if in firing a loaded gun, the defendant negligently hit and injure the plaintiff's leg.(p) But the rule, as settled in this state, in the above cases of negligent injury, done directly, is, contrary to the above English and Virginia decisions, that, in such cases, the plaintiff has an election to bring either *trespass* or *case*. And, accordingly, in the above mentioned instance, of negligently wounding another, by firing a gun or pistol, the Supreme Court of this state, decided on certiorari, that the plaintiff might bring an action of *trespass for the assault and battery*, in a court of record, or an action of *trespass on the case, for such act of negligence*, before a justice of the peace, who would have jurisdiction, if the plaintiff chose to adopt the latter form(q)

A plaintiff must, however, exercise ordinary care himself, in order to entitle him to this action. And if there be an unlawful obstruction in the highway, plain to be seen, and the plaintiff, passing along in the day time, rides with careless violence against it, and is injured ; he cannot sustain an action, for the injury arises from his own fault.(r)

By the statute of this state, (2 N. R. L. 283,) carriages, sleighs, &c. meeting in any publick road. must turn to the right, and if any injury arise from not complying with this provision, *case* lies. But where the streets are sufficiently wide, though another carriage might be driving on the wrong side, yet I am not justified in crossing over, and interfering with it, merely because the law authorizes me to drive on that side ; and if I do so, and am injured, no action lies, for it is my own folly, that I thus put myself in the way of harm.(s)

And where the plaintiff declared, that the defendant courted, gained her affections, and got her with child, under pretence of a design to marry her, and afterwards abandoned her, to the injury of her feelings and peace of mind ; it was held that

(n) 1 Stra. 634.

(n) 5 T. R. 648.

(o) 3 East, 593. 1 Campb. Rep.

497.

(n) 2 Hening & Munford, 423.

(q) 14 John. 432.

(r) 1 East, 60.

(s) 3 Esp. Rep. 635. 5 id. 44. id.

an action would not lie, for it was her own folly, to consent to the fornication.(t)

If a servant, in the course of my business, do an injury to another, I am accountable for it in this action ; as if, in driving my team, he negligently run my cart against another's carriage, by which it is broken, or against his cart, overturning it, and spilling his pipe of wine.(u) But if such injury be wilfully done by my servant, without my consent. I am not liable, for I am only answerable for damages, arising from my employing a negligent or unskilful servant ; and his wilfully doing an injury, is beyond the authority I give him.(v)

Where a man is in my employ building a chimney, and he lays lime in the road, by which another's carriage is overturned and injured, I am accountable for the damage ; and I should be equally responsible, if the man employed by me, hired another who laid out the lime, either in person, or by his servant.(w)

In all such cases, the servant who does the injury is answerable over to the master ; or the person injured may bring his action, in the first instance, against the servant.(x) But my servant, steward or agent, employing, in my behalf, the one who does the injury, is not accountable, in this action, or any other, either to me, or the person who receives the injury.(y)

This action of trespass on the case is defined by professor Woodderson, to be " a personal action, arising simply from *tort* or *wrong*, where no breach of any contract is suggested, and no forcible violence imputed to the defendant." " This negative description," he remarks, " is the only one, which can easily be given of what are denominated *actions of trespass on the case*. " It would, I believe, be impossible to recount all the occasions of bringing these anomalous suits: Every civil right, affecting our persons or our property, may be attacked by injustice, and that injustice may again be multifariously diversified, in acts of open malice or secret fraud."(z)

Accordingly, it does not lie with a defendant, as is frequently done in other cases, to say of an action on the case brought

(t) 3 Mass. Rep. 71.

(u) 2 Stra. 1004.

(v) 6 T. R. 125. 1 East, 160. 1 Pennington's Rep. 86.

(w) 1 Bos. & Pull. 404.

(x) Reeve's Domestick Relations, 377.

(y) 6 T. R. 411.

(z) 3 Wood. Lec. 167.

against him, "such an action, for such a cause, was never before brought." For where a lessor was hindered by a stranger, from entering on the lands leased, to see if waste had been committed ;(a) and where the defendant caused A to confess a judgment to him, (A, at the same time, owing him nothing,) upon which he issued execution, took A's goods, carried them away, and converted them to his own use, with intent to defeat a judgment creditor of A, in the collection of his debt :(b) and in another case, where the defendant maliciously removed the property of one, for whom the plaintiff was surety, to the intent that he should not receive his money ;(c) in each of these cases this action was held to lie at the suit of the party grieved, though the action was new and unprecedented. And wherever the common law gives a right, or makes a thing an injury, the same law gives a remedy. And so wherever a statute gives a right, or makes a thing an injury, without furnishing a remedy, the common law will furnish one.(d)

Upon this principle, where the plaintiff was the assignee of a judgment, which was a lien on real estate, from which the defendant pulled down and carried away certain buildings, knowing of the judgment, by which the plaintiff was deprived of the benefit of his judgment ; this action, though pronounced by the Supreme Court unprecedented, was yet held to lie.(e)—So, for a similar injury to the mortgagee of certain premises, or the assignee of a mortgagee ; but in this case the plaintiff must aver and prove, that the mortgagor had no other means of discharging the debt, besides the mortgaged premises.(f)

From what has been said, it will be perceived, that this is a very comprehensive action, to which no definite boundaries can be assigned. It embraces regions altogether unexplored by the law, but still, like all actions, it has its cultivated divisions, within which its operations are as well understood, and may be as readily applied, as those of any other action. With some of these divisions, however important, in regard to the higher courts, we have nothing to do. Actions for slander, malicious prosecution, and the numerous actions on the case, for injuries to real property, necessarily involving an inquiry into its title, are, by reason of their importance or intricacy, placed beyond the cognizance of a justice. Those cases coming within his jurisdiction, are mostly reducible to the following heads :

(a) Cro. Jac. 478.

(b) Carth. 3, 4.

(c) 1 Hen. & Mun. 685.

(d) Per Holt. ch. justice, Salk.

(e) 11 John. 136.

(f) 14 John. 212.

1. It lies for all DECEITS OR FRAUDS IN CONTRACTS, by which damage accrues to the plaintiff; as for FALSE REPRESENTATIONS, WARRANTEES, FRAUDULENT CONCEALMENTS and the like.

If a man sell me goods or chattels of any kind, as animals, carriages, or provisions, and there be any unsoundness, breachiness, trickishness, &c. in the animals, or unsoundness or other defect in the carriages or provisions, unknown to and unperceivable by me, but which is known to the vendor; if he represent the article free from defect, or even forbear to mention such defect, but conceals it from me; he is guilty of fraud, and liable to me in this action, even though I agree to take the property at my own risk. (g) But if he is utterly ignorant of such unsoundness or other defect, such representation or concealment will not render him liable, and if I mean to him make accountable under such circumstances, I must require him to warrant the thing sound or free from defect. (h) This general warranty is, therefore, frequently required on sales. It extends to all defects, except such as are perfectly plain or known to the buyer; but against the effect of such apparent failings as are perfectly obvious to the senses, and do not require any kind of skill or pains to discover, this general warranty is no protection. (i) Nor is it a protection against any other defect, if the buyer be informed thereof, even though the warranty be in writing and contain no exception. (j) Against the effect of such visible or known defect, therefore, the buyer should exact a special warranty, that it *shall not* injure, or will cure in such a time, &c. or he is without remedy, even though he give the price of a sound commodity. A general warranty is, moreover, always in the present tense, that the article is sound or free from vice, not that it *will be* hereafter, or *continue to be* so; (k) though by a special warranty to that effect, the buyer may, undoubtedly, make the seller responsible for future unsoundness or vice. For the parties have a right to bind themselves by a contract, to what extent they please, within legal and possible bounds. (l)

No particular form of words is necessary, to constitute a warranty, but any words evidently intended as such, to which the buyer gives credit, are sufficient. (v) And where an animal is sold by a bill of sale thus: "*A, sells to B such an animal, being sound and free from all disease;*" this is not a mere matter of description, but a warranty of soundness. (w) But it has been holden by the Supreme Court, that the mere de-

(g) Peak's N. P. cas. 115. 4 Hall's Law Journal, 618.

(h) 2 Caines, 48. 4 John. 421.

(i) 2 Caines, 202. 4 Hall's Law Journal, 618.

(j) *Id. ibid.*

(k) 3 Blac. Com. 166.

(l) *Vid. ante*, 56.

(v) *Vid.* 3 T. R. 57, 8.

(w) 10 John. 484.



scription of an article in a bill of parcels, as calling the article *Brazilletto wood*, when it is *peachum wood*, and worth little or nothing, is not a warranty that it is of the kind called *Brazilletto*.(x) Though the contrary seems to be the established doctrine in England.(y) And so where the defendant sold the plaintiff paints, for good *Spanish Brown* and *White Lead*, which proved to be bad, and of no value, it was holden that no action lay.(z) So where the contract was, to deliver cloth called *blue guineas*, but the delivery was of a different kind of cloths, of an inferior quality; it was held that no action would lie for the damages, arising to the vendee.(a) For though a fair price be paid for the article, this does not imply a warranty.(b) And no action will lie for avering a thing to be worth more than its real value, where there is neither fraud nor warranty.(c) But on a sale by sample, there is an implied warranty, that it is a fair specimen of the thing sold.(d)

Where there is an agreement in writing, for the sale, no action will lie on a parol warranty; for the writing is a higher and more certain species of evidence (e) If it contain a warranty, this should form the ground of action, but if it do not, it is conclusive evidence, that no warranty was intended.

But all the above cases must be received with this qualification, that wherever there is wilful misrepresentation, concealment, or fraud, by the vendor, either as to the kind, the soundness, quality, goodness or any other particular, of the article sold, an action for the deceit lies under all conceivable circumstances.(f) Though the contract be in writing;(g) though it be sealed, and contain covenants of warranty, or any other covenants, calculated in the most extensive manner to guard and protect the plaintiff's rights;(h) if the defendant have been dishonest in the transaction, the plaintiff may disregard all these, and sue him directly for the fraud. Nor is he snielded, as we before remarked, though the plaintiff stipulate expressly, to take the subject of the contract, and run his own risk as to its goodness; and an action for the fraud, where there is a warranty or covenant, is many times the most advantageous for the plaintiff; for a warranty is a mere contract, and the damages are limited to the specific loss. Fraud is a crime; and wherever a court

(x) 2 Caines, 48.

(y) 1 Starkie's Rep. 504.

(z) 4 John. 421.

(a) 1 John. 96.

(b) 2 Caines, 48. 4 John. 421.

(c) 5 John. 354.

(d) 5 John. 395. 13 Mass. Rep.

(e) 1 John. 414. id. 503.

(f) Peake's N. P. cas. 115, 4 Hall's Law Journal, 618.

(g) 1 Tennessee Rep. 174.

(h) 13 John. 325, 395.

or jury are convinced of its existence, to the injury of another, they may and should give damages, as in other actions for a wrong involving moral guilt, with a liberal and unsparing hand, both to compensate the plaintiff for his extraordinary trouble, in vindicating himself against the injury, and to furnish a moral lesson to their country, by the punishment of the defendant. (3)

There is always an implied warranty, that the vendor has a good and valid title to the thing sold ; and if this fails, an action lies for the damage, without either express warranty or fraud. (i) And in contracts for the sale of provisions, a warranty, on the part of the seller, is always implied, that they are sound and wholesome. (j)

How far the warranty must be confined to the time of the sale, vide ante, 56.

Assumpsit is also a proper form of action, and indeed the usual one, upon an express or implied warranty ; but it may be joined in the same declaration, with a count for a deceit. (k)

#### IT LIES UPON A BREACH OF WARRANTY, OR DECEIT, IN THE SALE OF A HORSE.

As the action for a breach of warranty and deceit, in the sale of horses, is frequent in this country, and especially in a justice's court ; I shall be excused in following the example of Mr. Holt, on reporting the case of *Broennenburgh v. Haycock*, (1 Holt N. P. Rep. 630) before Borough, J. at the Westminster sittings, 1817, by reducing the cases on this subject, into a distinct body by themselves.

That was an action on a general warranty of the soundness of a horse, on the sale. It was proved, that at the time of the sale, the horse was affected by a habit called crib-biting, which originated in indigestion ; that by this habit a horse wasted the *saliva*, which was necessary to digest his food. The witnesses stated that they did not consider crib-biting to be an unsoundness, though it might lead to an unsoundness. That is was sometimes an indication of an incipient disease, and sometimes produced unsoundness, where it existed in any great degree.

(3) Vol. 4 Hall's Law Journal, 618, 19, 20 ; conclusion of Judge Hall's charge to the jury, in North Carolina.

(i) 1 John. 274. 6 id 5.

(j) 3 Blac. Com. 166. 12 Johnr. 468.

(k) 6 John. 138, and for this head of case upon warranty and deceit, more at large, the reader may consult Bac. Abr. tit. actions on the case, (E) Philadelphia ed.

*Burrough*, Justice, remarked, that the question of unsoundness was, perhaps, compounded, both of law and of fact. If it was a question of law, he was of opinion, that in this particular case, it was not unsoundness ; and was satisfied the jury would think with him on the fact. It is a curable vice, in its first stages, and this horse was only proved to be an incipient crib-biter. It is a mere accident, arising from bad management in the training of a horse ; and is no more connected with unsoundness, than starting and shying. The plaintiff might have demanded a warranty, against this particular vice ; but he was quite clear, that it is not included in a general warranty. And the plaintiff submitted to a nonsuit.

The following is Mr. Holt's note to the above case, *verbatim* ; after giving which, I shall introduce a few American cases, on the same subject, with two English cases, not noticed by Mr. Holt.

“ Actions are so frequently brought upon a breach of warranty on the sale of horses, that it may be useful to collect the cases within the compass of a short note.

“ Horses being subject to secret maladies, it is usual with the buyer to require a warranty of soundness upon their sale. For if a horse, having a secret malady, be sold without a warranty of soundness, the purchaser has no remedy. If, indeed, a fraud have been practised at the time of sale, the buyer may have an action on the case for the *deceit*. But unless in the case of fraud, the maxim of the English law, contrary to that which obtains in the civil law, is *caveat emptor*. An express warranty, extends to latent defects. But if there be no such warranty, and the seller sell the horse, such as he believes it to be, without fraud, the law will not imply that he sold it upon any other terms than such as were stipulated at the time of the bargain.— It is the fault of the buyer, if he do not insist upon a warranty. It has been said, that there is an implied warranty of the goodness of an article arising from the conditions of all sales ; and this has been rested upon the principles of natural justice and equity, which must govern all the contracts of men without reference to the particular quality of the thing for which they contract. There is no such principle, however, in the English law. *Parkinson v. Lee*, 2 East, 314. It was formerly, indeed, a current opinion, that a sound price was *per se* an implication of warranty. In other words, that a sound price given for a horse was tantamount to a warranty of soundness. But, when this notion came to be judicially examined, it was found to be so loose and unsatisfactory, and so much at variance with the principles of the English law in contracts of buying and selling, that Lord Mansfield, (in *Stuart v. Wilkins*, 1 Dougl. 18.) reject-

ed it as a popular error ; and said, that there must either be an express warranty of soundness, or fraud in the seller, in order to maintain the action. See likewise, 1 Roll. Abr. 90. P. and the judgment of Mr. Justice Lawrence, in *Parkinson v. Lee*, *supra*.

“ The advantage arising to the buyer from an express warranty of soundness is this, that such warranty extends to every kind of soundness, known and unknown to the seller ; and if the warranty be false, the buyer has a remedy against the seller, to recover a compensation in damages. But as soon as the unsoundness is discovered the buyer should immediately tender the horse to the seller, for otherwise he will not be entitled to recover for the keep. *Caswell v. Coare*, 1 Taunton, 567.

“ A person sells a horse as of the age stated in a written pedigree, declaring that he knows nothing of the horse but that he has learnt from the pedigree. This is not a warranty. *Dunlop v. Waugh*, Peake, 123, *Kenyon*, C. J. 1792.

“ Where a horse has been sold, warranted sound, which it can be clearly proved was unsound at the time of the sale, the seller is liable to an action on the warranty, without either the horse being returned, or notice given of the unsoundness. *Fielder v. Starkin*, 1 H. B. 17.

“ In *Curtis v. Haynay*, 3 Esp. 83, Lord Eldon says, ‘ I take it to be clear law, that if a person purchases a horse that is warranted, and it afterwards turns out that the horse was unsound at the time of warranty, the buyer may, if he pleases, keep the horse, and bring an action on the warranty, in which he will have a right to recover the difference between the value of a sound horse, and one with such defects as existed at the time of the warranty ; or he may return the horse, and bring an action to recover the full money paid. But in the latter case, the seller has a right to expect that the horse shall be returned to him in the same state as when he sold it ; and not by any means diminished in value.’ A warranted article must be returned immediately ; or in a reasonable time after the defect is discovered.

“ But where on the sale of a horse, there is an express warranty by the seller, that the horse is sound, free from vice, &c. coupled with an undertaking on the part of the seller to take the horse again, and pay back the money, if on trial he shall be found to have any of the defects mentioned in the warranty, the buyer must in such case return the horse as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any



subsequent misrepresentation of the seller. *Adams v. Richards*, 2 H. B. 573. In such case, *trial* means a reasonable trial, 2 H. B. 573.

“ Upon the warranty of a horse as sound, the vendor, in a subsequent conversation, promised, if the horse were unsound, (which he denied,) that he would take it again, and return the money : though the horse be unsound, the vendee must sue upon the warranty, and cannot maintain assumpsit to recover back the price, for such promise does not discharge the original warranty. *Payne v. Whale*, 7 E. R. 274.

“ If a horse, sold at a public auction, be warranted sound, and six years old, and it be one of the conditions of sale that it shall be deemed sound unless returned in two days ; this condition applies only to the warranty of soundness. *Buchanan v. Parnshaw*, 2 T. R. 745. Therefore, where a horse, sold with such a warranty, was discovered to be twelve years old ten days after the sale, and was then offered to the seller, who refused to take him, it was holden that an action might be maintained by the buyer against the seller, on the warranty ; and his right to recover is not affected by his having sold the horse after offering him to the defendant, 2 T. R. 745. In an action on a warranty of a horse, the affirmative is, however, upon the plaintiff ; he must positively prove that the horse was unsound. *Eaves v. Dixon*, 2 Taunt. 343. And see *Lewis v. Cosgrave*, 2 Taunt. 2. In the latter case, where the plaintiff sold the defendant a horse, with a warranty of soundness, and the defendant gave the plaintiff a bill of exchange for the price ; the defendant discovering the horse to be unsound, tendered him to the plaintiff, who refused to take him back again, and brought an action against the defendant on the bill, it was holden, (upon the defendant's proving that the plaintiff, at the time of the sale, *knew* that the horse was unsound) that he could not recover upon the bill, for it was clearly a fraud ; and a person cannot recover the price of goods sold under a fraud.

“ Upon the breach of the warranty of a horse, if the horse is returned, the measure of damages is the price paid for him ; if the horse is not returned, the measure of damages is the difference between his real value and the price given ; if the horse is not tendered to the defendant, the plaintiff can recover no damages for the expense of his keep. *Caswell v. Coare*, 1 Taunt. 566, cited *supra*, and *Curtis v. Hannay*, 3 Esp. 83.

“ A horse labouring under a temporary lameness, occasioned by accident, and capable of being speedily removed, is not unsound. Therefore, an averment in a declaration of a general

warranty of soundness is supported by evidence of a warranty made with a particular exception of such temporary injury. *Gannett v. Davis*, 2 Esp. 673. *Eyre*, C. J.

"In an action upon the warranty of a horse, it is not enough that he is a *roarer*, as this may be merely a bad habit, or proceed from other causes unconnected with his general health and activity. To prove a breach of warranty, the roaring must be shown to be symptomatic of disease or infirmity in the particular case. *Basset v. Collis*, 2 Campb. 523.

"Where, by the conditions of sale, a horse is to be returned within two days if he prove unsound, he cannot be sent back after the expiration of that period, although the auctioneer may not have paid over the price to his employer. *Mesnard v. Aldridge*, 3 Esp. 271. *Kenyon*, C. J. 1801. A party, sued on a warranty of a horse, may call a prior vendor, who sold with a warranty, to prove the animal sound. *Briggs v. Crick*, 5 Esp. 99.

"A warranty of the soundness of a horse sold requires no stamp, it being an agreement "relating to the sale of goods."—*Shrine v. Elmore*, 2 Campb. 407.

"With respect to the form of pleading in an action on a breach of warranty, the ancient method, which was an action of tort, has long been superseded by the more convenient form of a declaration in assumpsit. This enables the plaintiff to add the money counts to his declaration. *Stuart v. Wilkins*, Doug. 18.

"Where the contract of warranty is still open, the plaintiff must declare *specially* upon the warranty. He cannot recover the price of the horse in an action for money had and received. *Towers v. Barrett*, 1 T. R. 133. *Power v. Wells*, Cowp. 818. *Weston v. Downes*, Doug. 23.

"It is usual to insert the warranty in a receipt for the price of the horse; and the receipt, if duly stamped with a receipt stamp, will be evidence of the warranty. An agreement stamp will not be necessary. *Shrine v. Elmore*, 2 Campb. 407. See likewise Selw. N. P. 4 ed. 630."

In addition to the above cases, collected by Mr. Holt, it was decided in *Briggs v. Crick*, 5 Esp. Rep. 99, that, in an action against the vendor of a horse, upon a warranty of soundness, he may call as a witness, the one who has sold and warranted the horse sound to him; or any other former proprietor of the horse, who has sold him with the like warranty. For the record in the cause upon trial, will be no evidence against the former warrantors, and they are therefore not interested.

It was decided by the above case of *Gannett v. Bavis*, cited by Mr. Holt. (2 Esp. Rep. 673, Eyre, Ch. J.) that a horse labouring under a temporary lameness, occasioned by accident, and capable of being speedily removed, is not unsound, within the meaning of a general warranty of soundness.

But a contrary doctrine, and one which certainly appears more consonant to common sense, has since been holden in *Elton v. Brogden*, 4 Campb. Rep. 231. The defendant here undertook to protect himself from the effect of a general warranty of soundness, by showing that the lameness complained of, was of a temporary nature, and that the horse after the warranty, recovered and had since become in all respects sound.

Lord Ellenborough. "I have always held, and now hold, that "a warranty of soundness is broken, if the animal at the time of "the sale had any infirmity upon him, which rendered him less "fit for present service. It is not necessary that the disorder "should be permanent or incurable. While a horse has a cough, "I say he is unsound, although that may be either temporary "or may prove mortal. The horse in question, having been "lame at the time of sale, when he was warranted to be sound, "his condition subsequently, is no defence to the action."

Where, instead of paying the money for a horse, I deliver some other chattel in exchange, as a horse, steers or a note; if the one of whom I purchased or received the horse in exchange, be guilty of a fraud in the exchange, I may return the horse and bring trover for the chattels which I gave in exchange. But before I can do this, I must return or offer to return, the whole consideration which I received, as if I receive a yoke of steers with the horse, they must also be returned or tendered; otherwise, my remedy is by an action on the case for the deceit; and not trover for the consideration. *Kimball v. Cunningham*, 4 Mass. Rep. 502.

I shall dismiss this part of my work, by giving the report of the following case, which is a true, and most elegant commentary, upon the doctrine of fraud in the sale of these animals; and presents the prominent features of perhaps one half the cases, of the description we have been considering, which we so often witness in our courts of justice. 4 Hall's Law Journal, 618.

## SUPERIOR COURT. NORTH CAROLINA.

BERTIE COUNTY, APRIL TERM, 1811.

*Joseph Blount v. John Chester.*

"This was an action on the case to recover damages for a deceit in the sale of a horse. The plaintiff bought the horse in question from the defendant in October, 1807, for the sum of one hundred and twenty-eight dollars. Soon after, in riding him from Windsor to Newbern, the horse became perfectly blind. It appeared in the evidence, that the defendant had purchased the horse about twelve months before he sold him. His eyes were at that time defective. The defendant applied a remedy which produced a temporary relief. But whenever the horse was rode a journey the disorder returned. The defendant in bringing him from Tennessee, had discovered he was getting blind, and was obliged to drive very moderately to prevent the loss of his eye sight. The plaintiff purchased without being apprised of this defect. The defendant had refused to warrant, saying he had determined never to do so, as he had already been injured by warranting his horses. He observed while exposing his horse to sale, that the eyes of some *looked dull*, but this was occasioned by their having travelled over dusty roads. He afterwards acknowledged, that he knew the horse was subject to blindness, but thought he was not answerable as he had not warranted. The horse after he became blind was sold for sixty dollars. This was the evidence on the part of the plaintiff.

"The defendant endeavoured, but unsuccessfully, to prove that the horse, after he came to the plaintiff's possession had received some injury, by which the blindness might have been occasioned.

"After arguments by counsel, his honour Judge Hall observed, that this was an action to recover damages for deceit in the sale of a horse. The grounds of this action were, that the property sold was defective, that this defect was known to the seller and unknown to the purchaser. If the jury believed, that the plaintiff *did* know of the defect at the time he bought the horse, he could not complain. He had sustained no injury from the defendant. It was his own folly. But it was for the jury to decide whether he did or did not know it. It was not because he might possibly have known it, that the defendant was to be discharged. If indeed, the defect was so open and visible that he could not well avoid discovering it, then the jury must of course presume against him. In the present case, skill might



have been required. The plaintiff might not have been possessed of this skill. If in fact, he was ignorant of the circumstance, though a person better acquainted with horses might have discovered it, the deceit and criminality in the defendant were still the same. He was imposing on the plaintiff as sound, what he knew to be unsound. He was not acting with that fairness and plain dealing which became an honest man. Again, it had been said, the plaintiff placed no confidence in the defendant—he saw the horse examined, and liked him; why was the defendant bound to disclose the defects of the property, which it was his interest to sell to the best advantage? He was bound by the rules of good faith and honesty. He was bound as a man of truth, of candour and of fair dealing. It is a principle in morals as well as a maxim in the municipal law, that a *suppression of truth, is often equal to a suggestion of falsehood*; a deception may be as effectually occasioned by the one as the other. Men must place some confidence in one another or there must be an end to civil intercourse. The confidence reposed by the plaintiff in the defendant in the present case, necessarily arose from the nature of the transaction. It was not an unreasonable one. The courts of that country, from which we derive our laws, have lately gone a great way in enforcing moral obligations, and I trust we shall go at least as far. In a recent case decided in England, A had sold a vessel to B, who agreed to take her *just as she stood*. It appeared afterwards that some of her timbers were unsound; that this was known to A, but could not have been known to B, when he purchased. The court determined that A ought in justice and honesty, to have disclosed this defect, and as he had not done so, should be liable to B in damages. Many persons in this country have considered themselves loosed from the obligations of morality, when they were trading in horses. It is time to correct this false notion. If the jury believe the evidence in the present case, and that the plaintiff knew not the unsoundness of the horse, at the time he purchased, they will give ample and exemplary damages.

“The jury retired, and in a short time returned with a verdict for 60*l.* 10*s.* for which judgment was entered.”

2. THIS ACTION LIES IN ALL CASES OF IMPOSITION AND KNAVERY, by which the plaintiff is wronged, though there be no contract; as for cheating at dice or other game.(a) Swindling one out of his money by forgery,(b) false tokens, or personating another.(3) And it also lies for a false affirmation, as to the credit of a third person, whom the defendant knew, or had reason

(a) Vid. Cro. Eliz. 90. Co. Ent. 8. F. N. B. 95. Moor, 776.

(b) Roll. Abr. 100. 3 Dall. 357.

(3) Skin. 119. Buff. N. P. 32.

to suppose, was at the same time insolvent ; whereby the plaintiff was induced to trust him and lost his debt.(c) But if this representation be made in good faith, with a firm belief that it is true, no action lies, though it be false ; and though the defendant say, that he speaks from his own knowledge, and not from hearsay. These expressions must be understood according to the subject, i. e. the credit of another, which is mere matter of opinion. He only means to convey his strong belief of the credit, founded on the means he has had of forming such an opinion and belief.(d)

So, if I hold a note or bill of exchange against you, which is void in my hands, for want of consideration, illegal consideration, or other cause ; but I indorse, or otherwise transfer it, before due, so that it is collected against you ; I am accountable in this action for the damages. But such transfer must have been before the note or bill was due, for otherwise your remedy is by a defence against the first suit upon it.

3. IN CASES OF BREACH OF TRUST by one's *attorney, agent, or servant, surgeon, physician, tailor, smith, barber*, or other person of a trade or profession, acting ignorantly, carelessly, or maliciously, in their several undertakings ; by which an injury is done to the plaintiff's person or property.

But it is to be remarked, with regard to a servant, or attorney, that they are bound to nothing more than diligence and fidelity ; and are never accountable for a want of skill or strength. This doctrine may be exemplified in the single case of the attorney, who manages his client's cause with diligence ; but, through ignorance does his client's cause an essential injury.—No action can be maintained against him by his client ; but if he had left his client's cause, when called on, and amused himself with hunting or fishing, instead of attending his business in court, and his client's cause had suffered on this account, he would have been liable.(e)

4. IN CASES OF A BREACH OF OFFICIAL DUTY. Where a *sheriff, constable, overseer, justice*, or other officer, neglects his duty, or abuses the trust reposed in him by law, (except for mistakes of law, where he has a right to act as a court or judge) to the injury or damage of another, this action lies against him,

(c) 6 John. 181.

(d) 2 East, 92.

(e) Vid. Reeve's Domestic Relations, 377, §. 3 Burr. 364.

at the suit of the party sustaining the injury.(4) Thus, if a *sheriff* or *constable* neglect to serve a writ or precept delivered to them, or a *justice* refuse to issue process, when properly applied for, or an overseer of highways wilfully neglects to mend a bridge in his district. by which a man's horse falls through, and breaks his leg, provided the overseer have work enough on his roll, or funds enough in his hands to enable him to amend the bridge ;(f) this action lies, for the injury suffered by such neglect or refusal. It lies against a *sheriff* or *constable*, for suffering an escape upon civil process, or for a false return of any such process, by which a party is injured in his rights.

An escape presupposes an arrest, which must always precede it. An arrest is the actual seizing or touching the defendant's body.(g) But if the officer tells him, he has a warrant or other process against his body ; and he submits and goes along with him, it is the same thing as an actual arrest.(h) An officer has no right to break open the outer door of a dwelling house, in order to make an arrest.(i) (And even lifting the latch is a breaking within this rule) but the door being once peaceably and legally opened, and entry being gained ; the officer may break inner doors to make the arrest.(j) But this privilege is confined to the defendant's *dwelling house*, and does not extend to any *out house*, as a *barn*, *shop*, *store*, and the like ; nor is my dwelling house a place of privilege for any one, except me and my family.(k)

If the escape of the prisoner be with the officer's consent or connivance, he has no right to retake him on the same process ; nor will a voluntary return of the prisoner into his custody, before an action is brought for the escape, operate as a defence against it.(l) But in case of a negligent or involuntary escape, the officer may retake the prisoner ; and such recaption or a voluntary return, before action brought for the escape, is a good defence to such action.(m) And if the prisoner is rescued, it is also a defence, except on process of execution.(n) This subject of *arrest* will be resumed, and more fully considered hereafter.

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(4) A sheriff is liable for selling goods, &c. on execution at an extremely low price. Vid. 3 Bos. & Pull. 359, 360, note(a). As where the sheriff had levied on goods worth between 300 and 400*l*, and sold them for 72*l*. 15*s*. 10*d*. Although they were sold to the highest bidder. He should return that they remain on hand for want of buyers. 3 Campb. Rep. 521.

(f) 15 John. 250.

(g) 1 Salk. 79.

(h) Bull. N. P. 62.

(i) 5 Co. 92. Hob. 62.

(j) Cowp. 1.

(k) 5 Co. 91. 16 John. 287.

(l) 2 John. cas. 13.

(m) 2 Stra. 908.

(n) Cro. Jac. 419.

An action on the case is the appropriate remedy for all false returns. but it will not lie against a militia officer, for returning one as a delinquent, whereby he is improperly fined by a court martial; for he should defend himself before the court. If the return be false and malicious, this action would lie, but the decision of the court martial is conclusive evidence against this.(o)

5. It lies, IN ALL CASES OF NEGLIGENCE, in the use or disposition of one's property, or in clearing or improving it, by which another is injured; and the true question, in such cases is, whether the defendant or his servant (4) has been guilty of negligence. For it is a maxim in law, that *a man is bound so to use his own, as not to injure that which belongs to his neighbour*. For example: he has a right to burn over his own fallow ground, or keep fire in his house; but if he, or his servant, carelessly suffer his fire to escape from his fallow, or set it on fire in a dangerous, dry or windy time, or do not take proper care of it;(p) or if he or his servants should keep the fire carelessly in his house, by which it took fire and burned down his neighbour's house, out house, &c. he would be accountable, in each of these cases, for any damage occasioned to his neighbour.(q) But if such fire break out, without his neglect, it would be otherwise.(r) And where my dog bites the person of a man, or his cattle, or my bull gore his child or his cattle, and so of other domestick animals, I am accountable for the injury; but, in these cases, it must be shown by the plaintiff, that I knew, or had notice, that my domestick animal was accustomed to do such mischief.(s) For where the plaintiff brought an action before a justice, and proved that the defendant's bull had gored his horse, but there was no proof, that

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(4) It is proper to remark, that this term, servant, as it is used in the law, is not confined to a slave, apprentice, or even a menial servant living in one's house, and working for him, but extends to any one employed to do the business or work of another. Thus, not only a slave, apprentice, or a person hired to work by the month, year, &c. but an attorney, solicitor, agent, day labourer, &c. &c. is for the time he is employed in the business of another, his servant, and his master or principal is to a certain degree, as we have noticed from time to time, accountable for his acts, and he is generally accountable over to his master for any injury he brings upon him by his negligence or misconduct. Vid. Reeve's Domestick Relations, title *master and servant*.

(o) 10 John. 100.

(p) 8 John. 421. Comyn's Rep.

(q) id.

(r) id. 3 Bl. Comm. 43. 1 Noy's Max. c. 44.

(s) 1 Ld. Raymd. 109. 2 id. 156.  
2 Salk. 662.



he had before done similar acts, or had been unruly, a judgment for the plaintiff was reversed on *certiorari*.<sup>(t)</sup> But this is otherwise, where the animal is naturally wild; for here the keeper is accountable for the mischief, which he does, whether he have notice or not (Ld. Raym. 1583.) And in case of a domestick animal, it is sufficient evidence of notice, or knowledge in the defendant, that his animal has done mischief similar to that complained of, twice before the injury alledged in the declaration <sup>(u)</sup> Proof of similar mischief is enough, as if a dog has bitten sheep and afterwards bite a horse, for the owner ought to have hanged him, on notice of the first mischief.<sup>(v)</sup> It is essential, that the plaintiff alledge in his declaration, that the defendant knew that his dog, or other animal, was accustomed to do the mischief complained of; and if this be not alledged, judgment will be reversed, if the objection be made in proper time.<sup>(w)</sup> But the plaintiff, in these cases, should exercise due care himself. Thus, every man has a right to keep a dog for the protection of his property, and, if the injury arise from the plaintiff's own fault, in going into the yard at night, after my dog is properly let loose, if he is bitten, no action will lie.<sup>(x)</sup>

A man, in building on his own lot, a joining my house, may sink his foundation below mine, but if, in so doing, he negligently injures me, an action lies.<sup>(y)</sup>

A man sets traps, baited with flesh, in his own ground, so near where my dogs are kept, or pass along the highway, that (without going so near as to trespass upon him,) they must probably be attracted by the scent into the traps, and they are so attracted and injured; an action lies by me, against the trap-setter.<sup>(z)</sup>

For this head, more at large, vid. Bac. Abr. title, actions on the case.(F) Philadelphia ed.

6. IT LIES, IN ALL CASES OF PRIVATE NUISANCE; as where my health or comfort is injured or impaired, by any unhealthy, noisome or offensive erection, made by another, as a mill-pond, hog-pen, slaughter house, tannery, &c. by which I am annoyed

(t) 13 John. 339.

(u) Vid. Bac. ab. tit. actions on the case. (F)

(v) Ld. Raymond, 606, 7, 3. id. 109.

(w) Cro. Car. 487.

(x) 1 Esp. Rep. 203.

(y) 17 John. 92.

(z) 9 East, 277.

in health, convenience or comfort. And this action lies, not only against the one who erects it, but also against the one who continues it. (a) And it may be brought, without any request to remove the nuisance ; but against another who continues, there must first be a request to remove it. (b)

It will also lie, for flowing the plaintiff's land by a mill dam, or otherwise ; or for diverting the water running to the plaintiff's land or mill, from its natural course. But a person erecting a mill and dam upon a stream of water, does not by the mere prior occupation, unaccompanied with such a length of time as that a grant may be presumed, gain an exclusive right, and cannot maintain an action against a person erecting a mill and dam above his, by which the water is in part diverted, and he in some degree injured. (c) But though such action will not lie for the reasonable use of the water, by the owner of the mill above, yet he has not an unlimited right to use the water as he pleases, or to stop the natural flow of the stream, so as to destroy or render useless the mills below ; and if he shuts down his gates, and detains the water for an unreasonable time, or lets it out in such unusual quantities, as to prevent the owner of the mill below from using it, or deprive him of a reasonable and fair participation in the benefits of the stream, he will be answerable to the party injured, to the extent of the loss he has thereby sustained (d)

One who has a private way, by grant, statute or prescription, may maintain this action against the owner of the lands, over which it runs, or any other person for obstructing or using it, without right ; (e) and where a private way is laid out, under the 20th section of the act to regulate highways, (2 N. R. L. 276) the one on whose application the way is laid out, has the sole and exclusive use of it, unless the owner of the soil signify his intention to use it, at the time the jury or commissioners assess the damages, and consequently, may sue the owner of the soil, in this action for using it. (f)

But the nuisance, in order to operate as a ground for this action should be a private one ; for if the injury be common to all the citizens of the state, as by obstructing a publick highway or a navigable river ; it is the proper subject of an indictment, and an action will not lie, unless indeed the plaintiff sus-

(a) 5 Rep. 100, 101. Willes, 583.

(b) 5 Rep. 100, 101. Willes, 583.

(c) 15 John. 213.

(d) 17 John. 306.

(e) 8 East, 4. 14 John. 383.

(f) 14 John. 383.

tain some special injury, as if he fall over the obstruction in the road and break his leg, or his horse, carriage, or some of his property or family sustain an injury, by which he is put to expense, or he is hindered in passing with his sloop, boat, raft, &c. or otherwise suffers a private charge in going down the river ;(g) and so of like cases. But the mere circumstance of being obliged to go a circuitous rout, to get round an obstruction in the publick highway, is not enough to sustain an action.(h) For the action on the case for a nuisance, vid. also Bac. Abr. title, actions on the case. (G) Philadelphia edition.

7. THIS ACTION LIES, (as well as an action of assumpsit, and indeed is more usual than the latter,) FOR ALL THE VARIOUS INJURIES, IN THE DIFFERENT CASES OF BAILMENT, which we have had occasion to mention. It is grounded on the fact, that the bailee has neglected to exercise that degree of care, which the nature of the bailment requires at his hands. And if the subject of the bailment is, in consequence of this neglect, deteriorated in value, lost or otherwise injured, this action lies, as well as where the bailee abuses his trust by destroying, damaging, or using it differently from what the contract would warrant. And in the case of a misfeasance, or abuse of the trust, it is a conversion of the property, for which an action of trover will lie, to recover the damages, even tho' the property be returned.(i) And in an action for riding a horse beyond the place agreed on, between the bailor and bailee, it was decided by the Supreme Court of Massachusetts, that trover is the only proper action, in as much as the misuser was a conversion.(j) The principle of this decision, undoubtedly, embraces every case of positive *misfeasance* in the bailee, which is, where he diverts the subject of his trust to an object, or use, entirely different from the one fixed by the contract of bailment, or where he transgresses the limits, within which this object or use is to be confined. In such case, trover would seem, in general, to be the only remedy. But where the misconduct of the bailee is of that negative kind, called *nonfeasance*, i. e. where he is guilty of *negligence* or *want of care*, in the user, confining himself, however, within the terms of the bailment, an action on the case is, in general, the only remedy. And where the goods bailed, are detained by the bailee, beyond the time allowed by the contract, and he refuses to deliver them, the bailor has his election to bring either trover or case. As where a man deposited his tools of trade, in an-

(g) 1 Binney's Rep. 463.

(h) 1 Esp. Rep. 148.

(i) 10 John. 172.

(j) 5 Mass. Rep. 104, & vid. 16 John. 76, per Spencer, J.

other's house, by licence, and they were detained by the bail-ee, for two months after request, by which the owner lost their use in his trade; case was held to lie, though trover might also have been brought. *(k)* But where property was delivered to the defendant to sell at a certain price, and he sells it for less than the bailor prescribes, trover will not lie, but the action should be a special action on the case. *(l)* And for the above difference in the remedy, between a *nonfeasance*, and *misfeasance*. vid. the opinion of Mr. Justice Spencer, in *Sarjeant v. Blunt*; 16 John. 74.

But in order to entitle the plaintiff to maintain this action, in the above instances of *nonfeasance*, there must be some trust, to which the law annexes a duty to take care of the goods.—For where a man is the mere finder of goods, he is under no legal obligation to keep them safely, or exercise any degree of care about them; *(m)* as if he find garments, and, by negligent keeping, they are moth eaten, or finds goods, and loses them again, or a horse, and gives him no sustenance, *(n)* or finds butter, and, by negligent keeping, it putridifies. *(o)* and so of the like cases. But for a *misfeasance*, he is accountable in these cases; and if he makes gain or advantage of the things he finds, he is accountable even for *nonfeasance*. Thus, if he rides the horse, or abuses the things, or destroys them, or uses them, he is accountable. *(p)*

The rights incident to a contract of bailment, with their corresponding violation, I have exhibited before, under the head of *bailment*, *(q)* and they do not need a repetition here.

8. This action lies for various injuries to a man, in the character of a husband, parent or master

1. Of a husband: as where his wife is enticed away to a separate residence, or her health injured by a sale of bad wine, provisions, &c. or the unskillfulness, ignorance or carelessness of her physician or surgeon, whereby the husband is deprived of her society, service or assistance in his affairs, or is otherwise injured. *(r)* But if she be enticed away by her father, bad or unworthy motives must be shown by the husband, in order to sustain the action. *(s)* And where the defendant permitted his wife's mother to live with him hospitably, though forbidden so to do by her husband, without enticing her away,

*(k)* Bull. N. P. 78.

*(l)* 16 John. 74.

*(m)* Cro. Eliz. 219.

*(n)* id.

*(o)* Leon. 223. Owen, 141.

*(p)* Roll. Abr. 5. Leon. 224 Cro. Eliz. 219. Gouls. 155. Style, 261.

*(q)* Ante, 30 to 35.

*(r)* Willes, 577. Bull. N. P. 78.

*(s)* 5 John. 196.



or opposing the plaintiff in his attempts to reclaim her, the action was held not to lie.(t)

It was formerly a matter of doubt whether an action of trespass, or a special action on the case, be the proper remedy for actual violence committed upon the wife, by an assault and battery or adultery.(u) Perhaps either action is a proper one; but whether it be trespass or case, neither this, nor the action for actual violence done to a child or servant, is properly an action of assault and battery, and it is, therefore, not excepted from the jurisdiction of a justice.(v) This point, as we noticed before,(w) has been directly decided in N Jersey, upon a statute, which in this respect, gives a Jersey justice jurisdiction, in the very words of ours; and this construction will be found fully borne out by the English cases above cited, for these are not actions of assault and battery.(x) As these are actions for consequential damages, grounded on the loss of service, or other consequential injury, I shall therefore consider them under this head, premising, however, that the action of trespass is far the more usual remedy.(y)

To proceed, then, with injuries to a man in the character of a husband. Any actual violence committed upon his wife, producing an injury to him, is also the proper subject of an action, and he need not, in such case, join the wife with himself, as a party to the action.(z)

A husband may also maintain an action, either for forcibly carrying his wife away, or for criminal conversation with her. But if the husband be consenting to the adultery of his wife, or otherwise privy to it, there is no ground for damages.(a) Nor can this action be maintained, when the husband and wife live separate, under articles of separation, for any act of adultery committed by her, after the separation took place.(b)—And so, where the husband, suspecting his wife of adultery, boarded her out, and agreed to pay for her board.(c) But where the husband has not given up all claim to the comfort, society and assistance of his wife, this action lies, though she be absent, under a deed of separation.(d)

In this action for adultery, a marriage *in fact* must be proved: reputation and co-habitation, though, in other cases, suf-

(t) 3 Mass. Rep. 317.

(u) 6 East, 387. Black. Rep. 854. Burr. 753.

(v) Black. Rep. 854. 6 East, 387.

(w) Ante, 11.

(x) 1 Pennington's Rep. 11], & vid. 14 John. 432.

(y) Vid. Cro. Jac. 501, 538.

(z) Cro. Jac. 501.

(a) Bull. N. P. 27.

(b) Peake's N. P. cas. 7

(c) 1 Esp. Rep. 16.

(d) 14 T. R. 651.

ficient, is not so here. A witness must be produced, who was present at the marriage ceremony.(e) But a marriage by a clergyman, magistrate, or third person, need not be proved.—It is sufficient, that the parties themselves contract, by words in the *present tense*; as “I marry you,” “you and I are man and wife,” or other words, intended as a present contract of marriage, by which the meaning of the parties can be plainly understood.(f)

If the character of the wife were debased, before the criminal conversation, the damages would be much less than if she had, before the seduction, maintained a fair reputation for chastity; and it is always allowable, for the defendant to shew, in mitigation of damages, particular acts of adultery, committed by her before she became acquainted with him, or that the plaintiff himself, has carried on a criminal conversation with other women, or that the plaintiff's wife made the first advances to the defendant. But witnesses are not to be examined by the plaintiff, to show her general good character, until it is assailed by the defendant.(h)

The wife's letters to the defendant are not evidence against the husband; nor are her confessions evidence against the defendant. But conversations between her and the defendant, are evidence against him. And evidence of the manner in which the husband and wife lived together, before her connexion with the defendant, is clearly admissible, for the purpose either of increasing or lowering the damages. And letters which have passed between the wife and the plaintiff, clearly proved to have been written at a time, when the wife was not suspected of misconduct, are admissible for the same purpose.(i)

The damages in this action, are graduated upon consideration of all the above matters, which are proper in evidence.—They are peculiarly a question of fact; for which reason the higher courts will not disturb a verdict on account of its large amount. Indeed, the claim of damages is generally so large, and the chance of recovering it, so great, that this action is rarely if ever a fit subject, in this respect, for the limited jurisdiction of a justice.

2. Nearly allied to the above, is THE ACTION FOR SEDUCING AND GETTING WITH CHILD, THE DAUGHTER OR SERVANT OF

(e) Vid. Esp. g. N. York ed. vol. 1, pt. 2d, 210. 4 Burr. 2057. 1 Bl. Rep. 632. Bull. N. P. 28. Doug. 177.

(f) 10 East, 286. 4 John. 54.

(h) Vid. Phillip's Evidence, 2 Am. ed. 139, and cases there cited.

(i) id. 64, 5.

THE PLAINTIFF. The father is also entitled to an action, where his minor child is beaten, by means whereof he has lost the services of that child, or been put to expense in curing him. But for the immediate injury to the minor, that is, for the *assault and battery*, and the bruises and wounds inflicted, the minor is alone entitled to his action of *assault and battery*, of which a justice has no jurisdiction; and the damages, when recovered in that action, belong to him only. The parent's right of recovery, rests upon the idea that he has sustained *special damages*. He must therefore lay his special damages in his declaration, by an express allegation, that he, *by reason of the injury, lost the service of his child*; (*j*) and if he claims on the ground of expense, this must be stated specially. Upon the principle of the right of the father, to the service of his minor child, he is entitled to an action, if such child be enticed away from him. On these principles, the action so often brought by a father, where his daughter has been debauched, is founded; viz. the loss of service. But this loss of service is not the rule of damages, in a case of seduction: it is scarcely an item in the account. The real ground for damages, is the disgrace of the family. The loss of service, in many instances, could not be accounted any thing: yet the damages will be large, and often where the least service is performed, the highest damages are given. And in all those actions, the character of the daughter for unchastity, and her connexion with another man, is allowed to be proved; and if satisfactorily proved, although it does not lessen the damages for actual loss of service; for that will be the same, whether the daughter was, before that time, chaste or unchaste; yet it will render the damages merely nominal. This demonstrates, that loss of service is not the real ground of the action, for the service of a daughter, whose character is bad in point of chastity, is of equal worth with that of the most virtuous. Still, however, the real expense, if any, of loss of service and lying in, should be allowed, although the daughter be unchaste. (*k*) The slightest degree of service, as merely milking a cow, has been holden sufficient to maintain the action, and to recover the heaviest damages. It has been lately holden, that it is not necessary to prove any service. If she lives in her father's family, service is presumed. (*l*) So, too, it is wholly immaterial, whether the daughter is a minor or not, if she live with her father. There is not any necessity in this case to show a contract, betwixt the father and daughter, respecting services,

(*j*) 9 Co. 113. Esp. Dig. 645.  
Peake's N. P. cas. 233.

(*l*) Peake's N. P. cas. 55. id. 233.  
1 Esp. Rep. 217, 115.

(*k*) Reeve's Domestick Relations,  
291, 2. 2 Caines, 292.

She shall be considered a servant to her father, without this proof.(m) When the daughter is under age, she is, of course, his servant; but this is not the case, if she be of full age.(10 John. 117.) The presumption in this case is, that she is his servant, if she live with him: but this presumption will be removed out of the way, by showing that she lives with him merely as a boarder; and that whenever she earns any thing it is her own. And, if she be of full age, and do not live with her father, she is not his servant; and under those circumstances he would not be entitled to this action.(n) But, in cases of a minor, it is immaterial whether she lives with her father or not. If she be at school, abroad, she is his servant; or which is the same thing, he has a right to her services, and can recal her, when he pleases. If she should be at service, he is, in general, entitled to the avails of her service.(o) And it is the same, if she work out with the consent of her father, and have no intention of returning, if the seduction had not happened.(p)

This action is maintainable, when the father is deceased, by any one, who stands in the place of a parent, as by a mother, aunt, or other connexion, with whom she resides;(q) or indeed, by any other person with whom she is actually engaged at service on hire, or otherwise, at the time the seduction takes place.(r) And so, by one whose daughter she is by adoption.(11 East, 23.)

In this action, the person seduced is a competent witness; for she has no interest in the event. It is true, she has an interest in the question; and that, formerly, excluded a person from testifying; but it never excluded the daughter in this action. She was always admitted *from the necessity of the thing*.(s)

This action is, properly, an action on the case, for the consequential damages are what the plaintiff seeks to recover, and constitute the *gist* of the action.(t) Where there has been an entry into the plaintiff's house, and this injury has been suffered, the action of trespass may be brought for entering the plaintiff's house or close, as in other cases, following this up by a statement of the injury, as an aggravation of the damages.(u) But when this action is brought, whatever will justify entering the house, is a competent justification of the whole charge, in the declaration, by way of aggravation;(v) as if the defendant

(m) Reeve's Domestick Relations, 292. 10 John. 115. contra.

(n) id. 10 John. 115.

(o) id.

(p) 3 John. 387.

(q) 2 T. R. 4.

(r) Peake's N. P. cas. 55.

(s) Reeve's Domestick Relations, 292. 3.

(t) 3 Wils. 18.

(u) Id. Raym. 1032.

(v) 1 H. Bl. 555.



should be allowed to show, that he had a license to enter. This would justify his entry, and bars a recovery in this form; and where this is the case, the only safe way is to declare in an action on the case, laying the consequential damages as the gist of the action. If, indeed, the defendant could in this case be considered a trespasser, *from the beginning*, as has been contended by some, a recovery might be had, where the breaking and entry is made the gist of the action. But this can never be the case; for a man is never a trespasser, *from the beginning*, for abusing a license from the party; but only where the law gives a license. When such license as the law gives, is abused, the law takes care of this, and pronounces the wrong doer a *trespasser, from the beginning.* (w)

Can the father have an action, for taking away his child? There can be no doubt that he is entitled to an action on the case, for enticing him away from his service; and it has been long settled in England, that he may have an action of trespass for taking away the heir; but I have not found any case of an action for taking away, by force, the younger children. Upon the principles of the common law, it is clear, that in these states, an action will lie for taking away any child: for all the children are heirs. The whole number of children constitute that character, known in the law by the term *heir*. But I see no reason, why, in England, the father may not maintain an action, against a person who takes away any child; for surely he is bound to perform certain duties towards his children, which he cannot perform, if they be taken from him: and, to enable him to perform these duties, he is entitled to the custody of his children; and, if this right should be violated by force, I have no hesitation in saying he could maintain the action (5)

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(5) Reeve's Domestick Relations 293, 4. There is a reason, why cases of this kind are not found reported in the English books, to which the learned and venerable author of THE DOMESTICK RELATIONS has not adverted. I mean the prompt and efficacious remedy afforded to the injured parent, by the writ of *Habeas Corpus*. Wherever the custody of a child is disputed, and any, the least restraint exercised over him, the Court of King's Bench have long exercised the right of compelling his production in court, upon this writ, directed to the person having him in charge; upon which they will proceed summarily, to set him at liberty, or place him in such hands, as are legally entitled to his protection and guardianship. Vid. 3 Keb. 526. 2 Lev. 128. 1 Str. 444. id. 579. 2 Ld. Raym. 1334. 2 Str. 982. 1 Burr. 606. 3 Burr. 1434.

This remedy has been granted to the husband, claiming the restoration of his wife. 1 Burr. 606. 1 Burr. 542. 4 Burr 1991.

The Supreme Court of this state exercise the same power, in this respect, with that of the English King's Bench. 2 John. 375. 13 John. 418.

(w) The six Carpenter's case, 8 Co. 146, as it is generally cited. In the Dublin ed. of 1793, it commences at page 290, which is there given as the original page.

The rule with regard to damages for debauching a female, is the same, whether she reside with the father, who brings the action, or it is brought by any other person. The simple loss of service, is, in neither case, to be considered the sole measure of damages, but they ought to be exemplary, in both instances, unless mitigating circumstances are shown.<sup>(x)</sup> These are nearly the same as in the above cases of adultery, and the connivance of the parent or master, at the criminal intercourse with the daughter or servant, will destroy the action in this case, as we have seen it will that of the husband in adultery.<sup>(y)</sup> So, where the defendant was a married man, but was suffered by the father to continue his addresses to his daughter, after this fact was discovered by him, it was held that such gross imprudence in the father deprived him of his action altogether.<sup>(z)</sup>—And the circumstances, that the father had repeatedly seen his daughter in bed with the defendant, without discountenancing such conduct, has been holden to defeat his action for the seduction, though it was proved, that bundling was a customary thing between females, and those who paid them their addresses, in the quarter of the country where the parties all resided.<sup>(a)</sup>

Although the daughter is a witness in this action for the plaintiff, yet the defendant has no right to ask her the question, whether, before her connexion with the defendant, she had been criminal with other men.<sup>(b)</sup> This is upon the principle, I suppose, that she is not bound to criminate herself. Nor has the plaintiff a right to show a breach of promise of marriage by the defendant; for this is the subject of a distinct ground of action, in the witnesses own name.<sup>(c)</sup> And upon a re-examination, after a lengthy cross examination, the daughter was asked this question, viz. Whether the defendant had not, previous to the seduction, given her a promise of marriage? Lord ELLENBOROUGH. “I think you may ask her, whether he paid his addresses to her in an honourable way. Farther than that, you can on no account go. To admit evidence of a direct promise of marriage, would be to allow the mother (who was in this instance the plaintiff) to recover damages for a breach of that promise upon the testimony of her daughter.”<sup>(d)</sup> In the same case, it was decided, that the plaintiff could not call evidence to support the character of the daughter, until the defendant had first called witnesses against her character.<sup>(e)</sup>

(x) 4 T. R. 4. 11 East, 23.  
Penke's N. P. cas. 55.

(y) 2 Caines, 219.

(z) Penke's N. P. cas. 240.

(a) 2 Caines, 219.

(b) 3 Campb. Rep. 519.

(c) 3 Wils. 18.

(d) 3 Campb. Rep. 519, 20.

(e) id.

This action lies, by the father, for the damages he sustains by a battery upon his son, who is under age, and lives with him, without proving any acts of service by the son. (f)

I have known several instances of this action being brought before a justice, by a father, against a schoolmaster, or other master, having a temporary right to correct the child. We shall see directly, that such action will not lie, unless there is some loss of service, by the means of such correction, to whatever excess it may be carried; or at least some trouble or expense in curing the wound inflicted. If some loss of this kind be not proved, the proper remedy is an action of assault and battery, in favour of the child, with which we have nothing to do in this treatise. Judge *Blackstone* remarks, (g) that, "a father may delegate part of his parental authority to the tutor or schoolmaster of his child; who is then put *in the place of the parent*, and has such a portion of the power of the parent committed to his charge, viz, that of restraint and correction, as may be necessary to answer the purposes for which he is employed." The very act of sending a child to school, undoubtedly, confers this right upon the teacher; and this, whether it be a delegated authority from the parent, as supposed by *Blackstone*, or a power possessed by a schoolmaster, in his own right, and not by delegation, as insisted by Judge *Reeve*. (h)

With regard to the master's right of correction, generally, and which, indeed, seems to apply equally to parents and schoolmasters, I shall adopt the language of Judge *Reeve*: (i)

"The master has a right to give moderate corporeal correction to his servant, for disobedience to his lawful commands, negligence in his business, or for insolent behaviour. This, however, is confined to apprentices and menial servants, who are members of the family; and not indeed to all such, if of full age; as hired men of full age: but only while the master stands *in the place of a parent*, then such authority may be exercised. He has full authority over all slaves, apprentices, and others living with him, who would, if placed with one, be subject to the control of a parent or guardian. If other servants be thus corrected, they may leave the master's service. It is said the master's wife cannot correct a servant: this, I apprehend, is to be understood with some qualifications. If the person who lives with another in the character of a servant to him, is of tender years, the principal care of such servant is commonly devolved on the wife: the chastisement of such person belongs to

(f) 1 Esp. Rep. 217.

(g) 1 Blac. Com. 479.

(h) *Reeve's Domestic Relations*, 375.

(i) *id.* 374, 5.

her in a special manner : without such power, she never could discharge the duties incumbent on her in educating the child. 1 Sid. 125. Cro. Car. 197. 1 Vent. 70. 8 Mod. 120. 3 Burr. 566. 1 Bl. 428. The right of correction is personal, and cannot be delegated to any one. A schoolmaster, in his own right, and not by delegation, possesses this power.(j) 9 Co. 76. 1 Ld. Raym. 310. Sira. 953. Cro. Jac. 630. A master cannot justify a wounding of the servant. This term, as used in our books, must, I think, be such a wounding as furnishes evidence that the master acted with a *bad intent*, which will subject him to damages ; for some wounding, according to the common acceptance of the word, might arise from very reasonable correction. I apprehend the jury are not warranted to find him guilty, for any, the least wounding, provided they find the correction to have been given with a right temper of heart. It must be so disproportionate to the offence, as to furnish evidence of the *bad intent*. 8 Mod. 120, 218, 330. 1 Sid. 177. 9 Co. Litt. 76. Cro. Jac. 866. Ld. Raym. 360."

3. This action lies for an injury done to a man in the character of a master. We have already seen in what cases it may be brought for seducing his female servant.(k)

Whenever a servant is enticed away from his master's service, the master is entitled to this action, for the loss which he sustains.(l) If a servant be taken away from his service, he may also bring an action of trespass, alledging his special damages.(m) If he go away from his master's service and be retained by another, who knows the fact of his having left his master's service, such person, so retaining, is liable to an action on the case,(n) and so if he keep him after notice, though at the time of the retainer he did not know him to be a servant.(o) And in the case of a slave, child or apprentice, he is liable, whether he have notice or not.(p) and no notice is necessary, to charge him for seducing and debauching a female servant.(q) This action has been holden to lie for the master, where a ditch was dug in the highway, into which the servant fell and broke his leg.(r)

If the servant be beaten by a stranger, so that any loss of service is incurred by the master, this action lies. He is not to

(j) 1 Blac. Com. 479, contra.

(k) Ante, 133, 9.

(l) Ld. Raym. 1116. 3 Salk. 191, 2. 2 East. 8, 14. 2 Saund. 169. 13 John. 322.

(m) Reeve's Domestick Relations, 376. Salk. 380. Ld. Raym. 1116.

(n) F. N. B. 390.

(o) 2 Lev. 68. 6 T. R. 221.

(p) Ante, 42.

(q) Peake's N. P. cas. 55.

(r) 1 Roll. Ab. 88.



recover for the battery itself; the damages for this, belong to the servant: (s) but for the damages to himself, occasioned by this battery, *in the loss of service.* (t) This doctrine obtains only in those cases, where the loss of service must fall on him. As in the case of slaves, apprentices, and his children, and all others, to whom he stands *in the place of a parent.* But not for a disappointment in his business, as where his hired servant has been beaten; for in this case the servant bears the loss, and is not entitled to pay, during the time he is disabled by a battery. (6) Another ground of recovery in such case is, the expense occasioned the master by the battery, whenever this expense falls upon him, as in the case of slaves, apprentices, children, &c. But in the case of an hired servant, the servant must ultimately be at all the expense himself: and such expense will be a part of the damages which belong to him. If the beating be such as occasions no loss of service, nor produces any expense, the master is not entitled to recover any thing. (7) For enticing away an hired servant, however this action lies, as a journeyman tailor, or other person at work merely on hire. (u)

It is laid down in the English books, that when a servant is so beaten that he dies, the master has no remedy, but I think Judge, Reeve has shown, that the reason of this rule has, in general, no application to this country. (v)

When a servant leaves his master by enticement, the master has his remedy against the servant, as well as against the enticer; and is entitled to recover damages against either, but not both. The real gist of the action in both cases is the wrong; and where damages are recovered against one for the same wrong, the recovery against one, is a bar to a suit against another, whether there has been any satisfaction or not. (w) though it has been decided in this state, that in the case of joint wrongdoers, an action against one will not prevent an action against another, until actual satisfaction, or at least an election of the damages, by taking out execution. (x)

When the goods of the master, in the care of the servant, are obtained from him by the fraud of a stranger, or lost by an innkeeper, with whom the servant deposited them as a guest, or

(s) Reeve's Domestick Relations, 376.

(t) 10 Co. 130. Cro. Jac. 618, case 8.

(6) But of this quere? Vid. Cowp 54, 5, 6.

(7) id. & vid. Reeve's Domestic Relations, 376, 7.

(u) Cowp. 54, 5, 6.

(v) Reeve's Domestic Relations, 377.

(w) id. & the cases there cited.

(x) 1 John. 290.

the master is otherwise injured by a fraud practised upon his servant, acting in his concerns, the action should properly be brought by the master, though we have seen, that wherever the servant is also a bailee, he may bring an action in his own name. (y)

My servant is himself accountable to me, in this action, for any breach of trust, whereby he injures me, as by negligence in his business, or by carelessly injuring another person, in the course of my business, for we have seen, that he is bound to exercise a degree of care adequate to the business he undertakes. (z) And if he should injure another, while engaged at work for me, as if in driving my team, he carelessly drive against another, and injure him, and I am sued to judgment therefor, or otherwise pay the damages, I may have this action against him to compel him to refund my loss. But this would be otherwise, if he do the injury by my command or countenance, for we should then be joint wrongdoers, and neither could compel the other to contribute. (a)

9. The last species of actions on the case, which I shall mention, are such as are grounded upon some statute. For every act of the Legislature, made for the redress or prevention of any injury of grievance, will found an action for things done contrary thereto, if not by express words, by legal implication. (b) I am speaking here of statutes which do not impose any pecuniary mulct; for in these cases, as we have before seen, an action of debt must be sued. (c) Take for instance the statute which forbids the removal of goods upon execution, off the demised premises, until a year's rent is paid to the landlord. (d) No penalty is imposed, or remedy prescribed, by the act itself; but the common law steps in, and gives an action on the case, in favour of the landlord, against the officer, who removes goods in violation of the act. (e)

But on the other hand, it has been adjudged, that this action does not lie for a disturbance of a right of ferry, granted under the act to regulate ferries within this state. (f) The only remedy is an action of debt, for the penalty given by the statute. This injury was not the ground of an action, at common law.— And, though where a statute gives a remedy in the affirmative, without a negative, express or implied, for a matter which was

(y) Cro. Jac. 223, 224, case 3. & 4.

(z) Ante, 33.

(a) Vid. Reeve's Domestic Relations, 172, 3, and cases there cited. Ante, 80.

(b) 10 Co. 75.

(c) Ante, 19, 20.

(d) 1 N. B. L. 437.

(e) Vid. Woodf. Land. & Tenant, 563, 4.

(f) 2 N. R. L. 210.

actionable at the *common law*, the party may have his election to sue at the *common law*, or under the *statute*; (g) yet, where the *statute* creates the *offence*, and provides the *remedy*, the *statute remedy* alone, must be pursued. (h) But if the *remedy* were provided by a *subsequent statute*, it will be cumulative, as in the case of a *common law remedy*. (i)

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SECTION V.

OF THE ACTION OF TRESPASS.

This is of two kinds : 1. *Trespass on lands, or other real estate*; and

2. *Upon personal property*.

We have seen, under the last head, when trespass will lie for an injury to the plaintiff, in the character of a husband, father or master, and shall not again notice this part of our subject, except to observe, that the form of the action once determined, the *incidental proceedings* are, in every other respect, the same in one action for these injuries, as in another, except in the *forms* of pleading, which are reserved for a future head.

1. OF THE GENERAL NATURE OF THE ACTION FOR TRESPASS ON LANDS, OR OTHER REAL ESTATE.

The term *land* is of sufficient legal compass to signify that description of *real property*, for a trespass upon which, a justice's court is competent to afford redress. "Land," saith Sir Edward Coke, (j) "comprehendeth, in its legal signification, any ground, soil, or earth whatsoever; as arable meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includeth, also, all castles, houses and other buildings; for they consist (saith he) of two things; land, which is the foundation, and structure thereupon: so that if I convey the land or ground, the structure or building passes therewith."

A direct injury, therefore, to any thing growing upon, or rooted in the plaintiff's land, or to any thing built and placed

(g) 5 John. 175.

(h) 9 id. 507.

(i) 9 id. 507.

(j) Co. Litt. 4.

there, with a view of improving it, or to any part of such building or improvement, is an injury to the land itself; for this word includes, not only the soil, but every thing *terrestrial*.<sup>(k)</sup>

Such injury is called an *entry into*, and *breaking* the plaintiff's close; and these words, being always used in declaring in this action, have given a name to it. To distinguish it from a trespass upon personal property, it is called *trespass for breaking the plaintiff's close*. The plaintiff should always allege, even in a justice's court, where he sues in this action for a direct injury to his freehold, that "the defendant broke his close," situate at such a place: for this it is, which gives character to the action; though other words, equivalent thereto, would undoubtedly be good in pleading, unless objected to by demurrer. This land is always, in contemplation of law, surrounded by a close: if not by a visible substantial fence or boundaries, yet by an *imaginary one*, existing in the eye of the law, which, in contemplation of that law, is always broken, when the injury of which we are speaking is committed. And the law will, moreover, always imply some damage or other, from a breach of that close, whether it be actually stepping or reaching over it to do the injury complained of: <sup>(l)</sup> for land hath also in its legal signification, an indefinite extent upwards, as well as downwards; <sup>(m)</sup> and a violation of its bounds, at any point, is, in law, an entry upon it.—Within this rule, even shooting and killing game upon it, is an entry in law. (Vide 1 Chitty on pl. 179.)

This right to land is *exclusive*, and every entry thereon, without the owner's leave, or the license, or authority of law, is a trespass.<sup>(n)</sup>

This *leave* from the owner, may be either *express* or *implied*. The first is, where he gives his consent to the entry in terms, by expressly authorizing another to enter upon his lands and do certain acts, either with, or without a valuable consideration for such entry. The second may arise, from the familiar intimacy of one neighbour with another, in consequence of which, he habitually enters on the plaintiff's land, or into his house, for the purposes of friendly intercourse.<sup>(o)</sup> And so, without doubt, from any other similar circumstance; as where the neighbours are in the habit of entering the plaintiff's close, to fetch water from his spring or well, or neighbours and strangers, to view a curiosity, or drink out of the plaintiff's mineral spring, or where the publick are in the habit of using a way,

(k) Vid. 2 Blac. Com. lib. 19.

(n) 3 id. 209.

(l) Vid. 3 Blac. Com. 209, 210.

(o) 12 John. 408, 9.

(m) 2 id. 18.



road or path, which the plaintiff has left open to them ; and so in a vast variety of similar instances, where the mind of the owner of the soil might be presumed to assent to the entry, from the acknowledged rules of good neighbourhood and intercourse, among mankind in general.

But this license, whether *express* or *implied*, unless it be upon such a valuable consideration as would sustain a contract, may, at any time be revoked by the owner, (p) who should give general or particular notice thereof, according as the right of entry was exercised by the publick, or by individuals, and any entry after such notice, would be a trespass.

A license to one man, to enter or cross my grounds, gives him no authority to take another with him ; though, if I authorize him to enter and do certain acts, as to cut down trees, dig clay, &c. he may take with him such tools, cattle and other help, as are needful to do the same. (q)

An agreement to purchase land, whether written or parol, is not of itself a license to enter upon it ; (r) nor does an actual license to enter, imply a right to cut and consume the timber. (s) Much less would a contract to sell and convey land, upon certain future conditions or acts to be performed by the purchaser, give him a right to enter, or cut timber, before the condition complied with ; nor does an agreement made with one of several purchasers, that until all of them had executed the contract of purchase, and a certain bond for the performance of its covenants, " no timber should be cut on the lot," imply a license to the purchasers, after the contract and bond are executed, to commit waste, by cutting and carrying away the timber. The most that can be implied by such a contract and agreement, is, a permission to the owners to enter, in the mean time as tenants at will, and occupy the land in a reasonable manner, as tenants at will might lawfully do. (t) If a tenant at will cuts timber, it is a trespass ; (u) and so if a person, after making parol agreement to buy lands, enter and cut timber, but afterwards rescind the bargain, he is a trespasser. (v)

A license, or authority, to enter on lands, is given by the law, in a great variety of cases, as to execute legal process ; or instance, a summons, warrant, attachment, execution, or any

(p) 10 John. 246.

(q) Vid. Jac. L. D. tit. license.

(r) 9 John. 35. id. 331.

(s) id.

(t) 9 id. 331.

(u) id. 35.

(v) id.

writ from the higher courts, &c. &c. to distrain for rent ; to a landlord, or reversioner, to see that his tenant does no waste, and keeps the premises in good repair, according to his duty, covenant or promise ; a creditor, to demand or request money due and payable there ; or any person entering an inn or tavern, to get refreshment there.(w) So, if a man make a lease, excepting the trees, he has a right to enter and shew them to the purchaser.(x) But a man has no right to enter, for the purpose of gleaning in another's field.(y) Nor has a man a right to enter upon another's land, for the purpose of taking away a chattel, being there, which belongs to the former,(z) unless, indeed, such chattel was sold to him, while there, by the owner of the land. In the latter case, where the owner of the soil sells the chattel, being upon his land, as if he sell a tree, or crop, a horse, or a fanning mill, which remain within his close, he, at the same time, passes to the vendee, as incident to such sale, a right to go upon the premises and take away the subject of his purchase, without being adjudged a trespasser.(a)

Where an entry, authority or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *from the beginning*, i. e. his original entry, and every act he does in pursuance of it, is viewed in the same light, as if the law had given him no authority whatever, to enter in the first instance. And the reason of this is, that the law adjudges by the subsequent act, to what intent he entered ; and the law always judges from the *acts*, as well as the *declarations* of a man, what are his secret intentions.(b) Thus, if he who enters an inn or tavern, doth a trespass, as if he carry away any thing ; or if the lord who distrains for rent, or the owner for damage feasant, works or kills the distress ; or if he who enters to see waste, breaks the house or stays there all night ;(c) or if he who enters a tavern, makes a great noise or disturbance, or behaves with rudeness ;(d) or if the constable, sheriff, creditor, landlord or bailiff, in the cases mentioned of their right to enter, for the service of process, demanding a debt, and distraining for rent, commit any excesses, as by illegally breaking open doors, assaulting or turning out of possession any of the family, &c.(e) in all these, and the like cases, they are, trespassers *from the beginning* ; and they are accountable for

(w) 3 Blac. Com. 212.

(x) 10 Co. 46.

(y) 1 H. Bl. Rep. 51.

(z) 6 John. 5. 14 id. 460.

(a) Vid. Bac. Ab. tit. trespass.

(F) 11 East, 366, per. Ld. Ellenborough.

(b) 8 Co. 146. In Ed. ed. 1793, quoted as p. 290, *The six carpenters' case*, 13 John. 414.

(c) id.

(d) 12 John. 408.

(e) 1 East, 139.

every thing they do, the same as if the law never had given them any authority whatever. But a mere *non-feasance* will not make a man a trespasser from the beginning : as if an officer, after seizing goods on execution, refuse to re-deliver them, on the judgment being paid ; the action should be *trover or case*, (15 John. 401.)

This rule, at the common law, extended to the landlord, who entered to distrain for *rent*, and, altho' this was a very nice proceeding, if he committed the least irregularity, he was considered a *tortfeasor* throughout, and answerable to the tenant for the value of the goods distrained. But this is now remedied by our statute, (f) which gives, to be sure, an action of trespass or on the case, for the injury arising from the irregularity or unlawful act itself ; but all the party can recover is the *actual damage* he sustains by reason of the irregularity, which, in most cases, is very trifling ; and even this action may be prevented by tendering amends for the injury ; and the distrainer will not be a trespasser from the beginning, if the original entry were lawful. But the old rule remains, as we shall notice more at large hereafter, as it respects distraining cattle or goods, *damage feasant*, as it is called, that is, *doing damage*, on one's premises ; as where my neighbour's sheep are found in my wheat field.

Under the above mentioned statute, giving *trespass or case* for the irregularity or unlawful act of the landlord, the distinction as to the form of action is this : If the landlord or his bailiff be guilty of a *misfeasance*, as by working the distress, or abusing it, or abusing the family of his tenant, or actually removing the goods, which he had suffered to remain upon the premises, after the five days allowed by the statute, (g) the remedy against him is, in *trespass* ; and so of the like cases : and so, I suppose, if he be guilty of neglecting to give due notice of sale, neglecting to appraise the goods, or give notice of the distress to the tenant as required by the statute, and yet go on and sell them : (h) but, if he merely suffer the goods to remain on the premises after the five days, without disturbing or removing them, or do any other act of mere *neglect or non-feasance*, as refusing to deliver them after the rent is paid, the action should be *trespass on the case* and not *trespass*. (i)

But where an entry, authority or license is given by one party to another, although the latter abuses it, an action will lie for the abuse, but he will not be a trespasser from the beginning.

(f) 1 N. R. L. 436.

(g) 1 N. R. L. 435. 11 East, 395. id. 405, (note) 13 John. 414, 15 id. 401. 10 John. 258. id. 372.

(h) id.

(i) 11 East, 395. id. 405, (note) 13 John. 414, 15 id. 401. 10 John. 248. id. 372.

And the reason is, because a party cannot, for any subsequent cause, punish that which was done by his own authority or license.(j)

Trespass should be with some degree of fault ; for, if I dog my neighbour's sheep off my ground, which I have a right to do, and my dog follows them just into *his* ground, whence I call him in, as soon as possible, I am in no fault whatever ; and trespass will not lie.(k) But, where there is any neglect or want of proper care, the action lies, as if I mow over the line, and cut a little of my neighbour's grass by mistake, the action lies.(l)

Trespass will not lie against me, if a public highway is impassable, and I of necessity go over the land adjoining ; though this would be otherwise of my private way, for it is my own fault, that I do not keep it in repair.(m)

## 2. OF THE POSSESSION NECESSARY TO MAINTAIN THIS ACTION.

The plaintiff must be in the actual possession of the land, at the time the injury is done, in order to maintain this action, (12 John. 183. 9 id. 61. 1 id. 511. 3 id. 468) which possession is generally evidenced, by fencing, cultivating or otherwise improving or using it ; or exercising such other acts upon or about the same, as the owners of lands generally do. But the mere payment of taxes on the land, or the execution of partition deeds, is not sufficient evidence of possession ;(n) but the actual possession of part of a farm, accompanied with a claim of title to the whole, will constitute a possession of the whole, though a part be altogether unimproved, and not enclosed by any kind of fence.(o) This is a very common sort of possession in a new country, where, though a man may own a large farm, he yet frequently has but few acres under improvement. Where such unimproved part is trespassed upon, it would be asking too much, to require a regular deduction of title upon paper, in order to vindicate the owner against a succession of petty injuries, although it is many times very important for his safety, that the trespasser should be punished. The plaintiff may then, without doubt, show his *own* acts and declarations at the time of his original entry ; and the deed given to him, would be proper evidence to determine the extent of his possession, as well as his acts of ownership after his original entry. And this is not, properly, an inquiry into any thing more than a mere possessory

(j) 8 Co. 146. In Edinburgh ed.  
of 1793, p. 290. 13 John. 414.  
(k) Poph. 160.  
(l) 3 Lev. 37.

(m) 2 Show. 28. Doug. 716.  
(n) 3 John. 388.  
(o) 1 Caines, 353. 12 John. 452.



title. It is an inquiry into such things as *might be used in evidence of a higher title*, but are here the *mere evidence of possession*. Where land is vacant, that is, where no actual possession can be proved, or where it is unoccupied, the one having the legal title thereto, shall be deemed to be in possession thereof, so as to maintain trespass ;(p) and the landlord of a tenant at will may have trespass against him, for any voluntary waste, which would determine the will.(q) A late statute gives trespass to a reversioner or remainder man, for any injury done to the inheritance.(r) But in these cases, where the possession or right of action is established by a deduction of title, as in the case of vacant lands, or an action for an injury to the interest of a remainderman or reversioner, they appear so directly to involve an inquiry into title, independent of actual possession, and some times too, the most difficult of all legal inquiries, depending even on the nice doctrine relative to vested and contingent remainders, that I can hardly conceive of a single instance, in which a justice would have jurisdiction.

A man shall be deemed in actual possession of a highway, running over his lands ; and may maintain trespass against another, for any use of the road, except for the purposes of travelling, as for cutting timber, digging in the soil, piling boards, or any other exclusive appropriation of the soil. By laying out a road, the public acquire a mere right of travelling, and every other right belongs to the owner as exclusively, and he has the same remedy for enforcing it, as if the highway had never existed. And the statute,(s) which declares that the trees in a highway belong to the owner, is merely in affirmance of the common law, which has always holden the same language.(t)

A tenant, merely entitled to the *emblements*, (crops) may maintain trespass *for breaking his close*, for any injury done to, or interference with them : (u) and, indeed, an interest in the soil is not necessary, in order to maintain this action ; but an interest in the profits is sufficient ; for, if I buy standing grass, or other crop, upon another's land, to be cut by me, and it is cut and taken away by a wrong doer, I can bring this action ; for the law adjudges me in actual possession, and that the wrong is a *breach of my close*.(v) And so, if I have an exclusive right to dig turf, gravel, clay, &c. which is violated by a stranger.—Where the tenant has assigned all his interest in the crop to an-

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(p) 2 Hayw. Rep. 402. 12 John. Wils. 107: 6 East, 154. 2 John.  
183. 357.  
(q) 7 John. I. 9 John. 35. (u) 9 John. 103. id. 143.  
(r) 1 N. R. L. 527. 11 John. 429. (v) 6 East, 602. 9 John. 103, per  
(s) 2 N. R. L. 379, Sec. 28. Kent, Ch. J.  
(t) 1 Burr. 143. 2 Stra. 11004. 1

other, trespass should be brought in the name of the latter, for the wrongful taking away such crop. (9 John. 143.)

Where the owner or possessor of land, works it on shares with another, they are tenants in common of the crop, and unless they both sue for an injury done to it, the defendant may plead this in abatement. (w)

Merely clearing out a fishing place in a public river, does not give such a possession of it, as will maintain trespass. (x)

Where the termination of a lease is fixed and certain, the tenant is not entitled to the off going crops sowed by him during his term; but they go to the landlord, or the successor of the tenant, under a new lease; but it is otherwise where the termination of the lease is uncertain, as if it depend upon an event over which the tenant has no control, or upon the will of the landlord. (y)

### 3. WITH REGARD TO THE THINGS FOR WHICH THIS ACTION LIES.

#### 1. OF AN INJURY TO LAND FROM CATTLE, AND OTHER CHATTELS.

1 Where another's chattels, of any kind, are wrongfully placed on my land, I may have an action of trespass, or may distrain them *damage feasant*, in the same manner as we shall by and by see, I might do his cattle. Thus, stacks of corn and the like, are considered *damage feasant* and distrainable; so of turves, nets, oars, &c. (z) and these things are to be retained as a pledge for the damages done, until amends be tendered or paid; (a) for the statute, providing for appraising and selling for the damages done, applies only to *beasts damage feasant*, (b) and not to dead chattels, or feathered animals, the doctrine in relation to which remains the same as it stood at common law. The things distrained for *doing damage* must be taken in the *very act*; for if once off the premises though you are in pursuit of them, you cannot distrain them; and if they have done damage to day, and gone off, and come again at another time, and are doing damage, they can only be distrained for the damage they have done the second time. Moreover, they can only be distrained

(w) 3 John. 216.

(x) 12 id. 425.

(y) 10 id. 360.

(z) Vid. cases cited, 3 Woodd.  
Lec. 225, 6.

(a) Vid. Woodfall's Law of Land.  
& Tenant 627.

(b) 2 N. R. L. 124, 5.

for the damage they themselves have done, and one beast, fowl or other chattel, *damage feasant*, cannot be distrained for damage done by another at the same time, though in the same field, and belonging to the same owner. This distress may be taken by night or by day; and if it be stolen or set at large by a stranger, the distrainer shall not be answerable for it. If tender of amends, for the injury done, be made before the taking, the *taking* is unlawful; if after the taking, and before the impounding, the *detainer* is unlawful; but tender comes too late, after impounding, to make either the *taking* or *detaining* unlawful; still, however, after the impounding, the distrainer may take the amends, and let go the distress, if he please. All the above rules, in relation to the mode of distraining, apply to beasts as well as other chattels. (c) But after distress made, the mode in which it is to be disposed of, differs widely. In case of things, other than beasts, they are simply to be kept by the distrainer, till amends be made, for the injury done. This must be in a pound, either *private* or *public*; and a pound is either *overt* (that is open over head) or *covert*, (i. e. closed over head.) The distrainer may keep the goods in which he pleases, i. e. in a public or private pound, which latter, he has a right to provide on his own premises, or in any part of his buildings, or procure a place at his neighbour's. But a pound for *beasts* distrained, must always be *overt*, (1 N. R. L. 434. S. 4.) If the pound be *covert*, the distrainer must feed the animals himself; if it be *overt*, the owner must feed them; but this distinction could only exist at common law, before the statute last cited. And if it be a *special pound overt*, provided by the distrainer, he must give notice of the place to the owner, but if it be a *common, or public pound overt*, the owner must take notice of the place at his peril. (d)

As to the mode, in which *beasts* distrained, *damage feasant*, are to be disposed of. vide 2 N. R. L. 134, S. 19 & 21, which we shall have occasion, incidentally, to notice again by and by.

Where my neighbour's beasts any of them come upon my lands, or his dead chattels are unwrongfully placed there, I may, as we have noticed, either distrain them *damage feasant*, in the manner above mentioned, or have my action of trespass, for the damages done by them; (e) and, in these cases, the declaration charges the defendant with *having broken the plaintiff's close, and done the damage by his beasts, fowls or dead chattels, specifying what kind of beasts, fowls or chattels, the damages were done by.*

(c) Vid. Woodf. Law of Land. & Tenant, 627, 8.

(d) 3 Bl. Com. 13, 14.

(e) Vid. 3 Woodd. Lec. 225, 6. 12 John. 433. 6 Mass. Rep. 99.

With regard to such animals, as are not restrained by fences, the owner must keep them on his own premises, at his peril, and, if they injure his neighbour, he is accountable for the trespass, without regard to enclosures ;(f) but if they are such animals as are usually restrained by fences, the defendant is not liable, if they escape from his premises into his neighbour's, through the defect of a fence which his neighbour is legally bound to repair ;(g) and this leads to an inquiry when, where, and in relation to whom, is the party bound to keep his fences in repair, so as to entitle himself to distrain beasts, damage feasant, or bring an action therefor ?

WHEN, WHERE, AND IN RELATION TO WHOM, THE PARTY IS BOUND TO REPAIR HIS FENCE.

By the 17th section of the "act relative to the duties and privileges of towns,"(h) it is provided, that where the lands or meadows of any two, or more persons shall join each other, each of them shall make and maintain a *just proportion* of the division fence between them ; except such persons shall choose to let their lands or meadows lay vacant and open. If such proportions are disputed between them, the town fence viewers, or any two of them, are to decide it, and settle the proportions. If any person neglects, or refuses to make or keep in repair his proportion, he shall be liable to pay all damages arising therefrom, &c. and after ~~one~~ month from a notice and request to make or repair as aforesaid, the party adjoining, may do it for him, and recover the expense in an action *for work and labour*, with costs.(i) And if any person having built such proportion, shall be disposed to throw up his lands or meadow for common feeding, or to let the same lay open, he must give three months notice thereof, to the adjoining owners, and, if the fence be removed before such notice, or the expiration thereof, the one who so removes it, is made liable for all damages, &c.

This notice to build or repair, need not be in writing, and if it is written, it may be proved by parol.(j) And where it does not appear, that there was a dispute as to the proportions, this notice is enough to sustain the action for repairing or building in default of a compliance with it, without the interference of the fence viewers.(k) The amount of the expense, is to be settled in such case by witnesses.(l)

(f) 6 Mass. Rep. 90.

(g) id. & 12 John. 443.

(h) 2 N. R. L. 125.

(i) id. & 9th John. 136.

(j) 9 John. 136.

(k) id.

(l) id.



An agreement relative to the proportions of the partition fence must be made between the parties, *(m)* and even after such agreement, if a dispute arises relative to the proportions, it may be settled by the fence viewers, *(n)* But they have no power to oblige a party, in any case, to make a fence across his own land, *(o)* It seems that the decision of the fence viewers may be by parol; and that where there is a contrariety of evidence as to what their decision is, if there appears enough to support it, it shall stand, *(p)* It does not belong to the plaintiff to show the situation of the fence, but this is matter of defence; and this, or any other matter of defence, to excuse the trespass, must be shown by the defendant. (15 John. 220.)

By the 12th section of the above statute, *(q)* town meetings have power to make such prudential rules and regulations, as a majority shall from time to time judge necessary and convenient, for making, maintaining and amending their partition and circular fences, for their lands, gardens, orchards and meadows; for impounding all manner of cattle and creatures whatsoever; and for ascertaining the sufficiency of all partition and other fences; and for ascertaining and directing the times, places and manner of permitting or preventing cattle, horses, sheep and swine, or any of them, to go at large, and to enforce the above regulations by penalties.

It is doubtful, whether a town has power to interfere under this act, with the interior regulations of a man's farm, by compelling him to keep his swine or other animals, shut up in a close pen, or other inclosure; and a by-law, "that all hogs shall be kept up," must be construed to mean merely, that they shall not run at large as *free commoners on the highway*; and if they break through a partition fence, between their owner and his neighbour, through defect of the fence, which his neighbour is bound to repair, no action will lie, notwithstanding such by-law, *(r)* though, where cattle, &c. are not allowed by the town law, to run at large, it seems that if they break through an outer fence, adjoining a highway or common, the owner is liable in trespass, or they may be distrained, although the fence be defective. *(s)*

With regard to the making and repair of partition fences, besides the above statute regulations, there appears to be no

*(m)* 4 John. 414.

*(n)* id.

*(o)* id.

*(p)* id.

*(q)* 1 N. R. L. 131.

*(r)* 12 John. 433.

*(s)* id. & vid. 6 Mass. Rep. 99.

good reason, after an actual division, by an agreement, between the adjoining owners, ascertaining their proportions of a partition fence, if the cattle of one tenant escape into the close of the other tenant, through the defect of the fence, which the other had agreed to make and repair, why the owner of the cattle might not aver, that the party complaining, had bound himself, by *agreement*, to make and maintain the fence, and that the cattle escaped through his default. For if he had agreed to make and repair the fence, he ought by law, to fulfil his agreement. (t)

But when there has been merely a written agreement, between the tenants of the adjoining closes, without any actual *assignment* of their proportions of the fence under it, it may be doubtful, whether such agreement shall have the force of an assignment; and if not, whether the tenant, whose cattle have escaped, can plead such agreement in bar of an action of trespass, or must have his remedy by an action on the agreement. (u)

Another mode, in which the proportions and obligations of the parties may be determined, is by *prescription*, that is to say, a usage of the tenants of adjoining closes, and those who have held the same closes before them, to repair certain proportions thereof, respectively, for a time whereof the memory of man runneth not to the contrary. The country has now been settled long enough, in some parts, to allow of the time necessary to prove a *prescription*; and ancient assignments by fence viewers, made under the late provincial laws, and also ancient agreements made by the parties, may have once existed, and be now lost by the lapse of time. (v)

This defence, then, grounded on a defect of partition fences, may be reduced to three kinds:

1. *The owner of the cattle may aver, that the party complaining ought, by the law, to make and maintain the fence, through which the cattle escaped. To prove this, he must produce or prove the assignment made by the fence viewers.*

2. *He may make the same averment, and show that the plaintiff is bound by agreement, to make and repair the fence, which agreement, the defendant ought in pleading to set out.*

(t) 6 Mass. Rep. 96, 7, per Parsons, Ch. J.

(u) *id.* 96.

(v) *id.* 97. Vid. 2 John. 357.

(w) Vid. 6 Mass. Rep. 97, per Parsons, C. J.

3. That the plaintiff was bound to make and repair, by prescription, when the defendant should regularly plead the prescription, and prove it by ancient usage. [See the very sensible and rational opinion of Popham C. J. against that of the other judges, in the case of *Nowell v. Smith*, Cro. Eliz. 709.] (w) The form of this last plea is in F. N. B. 298. Note.

If the evidence show that the beasts got over that part of the fence, which the defendant had kept in repair, as his part of the fence, for several years; this is enough, at least *prima facie*, to show that such part belongs to him to repair. (15 John. 220.)

Every person, then, may distrain cattle *doing damage* on his close, or maintain trespass against the owner of the cattle, unless the owner can protect himself, by the provisions of the statute, or by an agreement, to which the parties to the suit are parties or privies, (7) or by prescription (x)

Ch. Justice Parsons, in the opinion from which I am making extracts, thinks this agreement must be in writing. Whether this opinion is founded upon the notion, that it relates to an *interest* in lands, and is, therefore, within the statute of frauds, or founded on an expression in the Massachusetts statute, which he is considering, I cannot distinctly gather from his argument, though I am inclined to believe it is the latter reason. And I hardly think, that a *parol* agreement to divide a partition fence, which is carried into effect by an actual division, would in this state, be holden invalid, as being an agreement concerning an *interest in lands*, after the decision of our Supreme Court, that an executed agreement *by parol*, would bind as to the *division line itself*, between two farms, and operate as a defence in an action of ejectment. (y)

The above statute and remarks, relative to the building and keeping partition fences in repair, do not apply to lands enclosed in a general field or common pasture, nor a close adjoining to a highway. (z) Nor is a tenant obliged either by section 17th, by prescription, or agreement, to make his portion of the division fence secure, against any cattle, &c. *not lawfully in the adjoining close*: and unless the owner of the cattle, &c.

(7) That is, where the *predecessor* in ownership, or the *landlord* of the party, made the agreement, by which the present possessor, claiming under him, is bound, as a *privy* to the agreement, though *not a party*. Vid. 4 John. 414.

(w) Vid. 6 Mass. Rep. 97, per John. 109. 9 id. 61. Vid. also 15 Parsons, C. J. John. 220.

(x) id.

(z) Vid. 6 Mass. Rep. 96.

(y) 2 Caines, 193. vid. also, 10.

has some interest in the adjoining close, to authorize him to put his cattle there, as a right of way, an highway, a license, a lease, or a right of common, he cannot avail himself, of the insufficiency of the fence of the close injured, though the tenant of that close be bound to keep it in repair. (a) And, accordingly, if the cattle of A escape into your close, through the defect of a fence, which you are bound to keep in repair, and thence into my close, though it be through my own defective fence, which I am bound to repair, yet I may distrain them or have an action against A, because I am not bound to fence against his cattle, which he has no right to place upon your land. (b)

In this state, however, perhaps the town meeting would have a right to interfere, under the 12th section of the act above mentioned, and pass a by-law, that the one who is legally obliged to build and repair a partition fence, shall make it in a certain manner, so as to be proof against cattle, &c. and that, in default of so doing, his fence shall be adjudged insufficient to protect him against cattle, whether rightfully or wrongfully on the adjoining close.

However, as few towns have probably gone so far ; as in many towns there are probably no regulations on this subject, and, in many instances, where town regulations do exist, the partition fences remain, in a great number of cases, undivided between the adjoining proprietors, it is better, before we close this head, to consider the common law doctrine on this subject, which divides itself into two branches :

1. *Of the right of the tenant to distrain or bring trespass for an intrusion of cattle, &c. into his close, where there is no apportionment of the division fence between the adjoining proprietors, either by an agreement, the fence viewers, or prescription.*

2. *To what cattle, an obligation to fence, in either of these three ways extends.*

1. At common law, the tenant of a close was not obliged to fence against an adjoining close, unless by force of prescription, but he was, at his peril, to keep his cattle on his own close, and to prevent them from escaping. And if they escaped, they might be taken, on whatever land they were found damage feasant ; or the owner was liable to an action of trespass by

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(a) Vid. The argument of Ch. J. Patons, 6 Mass. Rep. 94 to 102.

(b) 6 Mass. Rep. 97 to 101.



the party injured.(c) And where there was no prescription, but the tenant had made an agreement to fence, yet he could not be compelled to fence, and the party injured, by the breach of the agreement, had no remedy, but by an action on the agreement.(d)

By the statute, however, the respective occupiers of two closes adjoining, are bound each one to make and maintain half the partition fence. But unless the fence has been divided by an executed agreement, or by the fence viewers, or by prescription, neither party is obliged to make or maintain any part of the partition fence, and of course the rule remains as at common law.(e)

Indeed, if there be in such case, a joint obligation to make the fence, no legal effect would flow from it, in favour of the owner of the cattle : for then, each party would be bound equally to make every part : and, if the fence be defective, each party would be chargeable with the deficiency ; and upon the escape of cattle from either close to the other, through a defect in any part of the fence, the owner of the cattle could not alledge the escape to be from the deficiency of the other's fence.(f)

2. We have already remarked, that this fence, is intended to protect the owner, against cattle *lawfully* in the adjoining close, and none other ; and that those cattle are not lawfully there, which have broken in through the defect of a fence, which the owner of the adjoining close was bound to repair. Accordingly, where Rust's cattle broke from his close, into Low's close, and from Low's into Rigg's close, and from Rigg's into Trask's close, and Trask distrained them *damage feasant* ; it was held, that although all these fences might have been out of repair, without Rust's fault, and although he might have defended himself against Low for the trespass, yet he could not do so against Riggs or Trask, though they might each have been bound to keep in repair, their respective fences, through which the cattle passed.(g)

Cattle in the highway, are spoken of by Ch. Justice Parsons, as being in a place, against which the tenant is obliged to fence by prescription at common law, (which he places on the same ground with a *statute* or *conventional* obligation,) because they are *lawfully* there ;(h) and he cites F. N. B. 298, *note*, to prove

(c) id. 94, per Parsons, Ch. J.

(d) id. & vid. Cro. Eliz. 709.

(e) 6 Mass. Rep. 100.

(f) id. 101.

(g) 6 Mass. Rep. 90.

(h) id. 99. id. 97, s.

he position. This should be understood with its proper qualification. The note referred to, quotes three authorities from the Year Books, 15 H. 7. 17, 22 Ed. 4. 8. 49, and 10 Ed. 4. 8, as proving this position: *that if beasts escape in view of the owner, by default of inclosure, as out of a highway, &c. fresh suit may be shown in justification: but if it does not appear they were in view of the owner, fresh suit shall not be pleaded in bar, except the plaintiff alleges notice.* These cases evidently suppose the owner travelling with his beasts, or the beasts alone turned into the road, to travel from one point to another; but the owner has no more right to turn his beasts out into the highway, or suffer them to run there for the purposes of grazing, than he has to turn them into his neighbour's field. We before remarked, (i) that the publick right is that of travel merely, and any other appropriation of the highway by an individual, is a trespass; so that it cannot be said, that beasts, except to be driven or passed from one place to another, are rightfully in the highway, so as to put the owner of the adjoining close under obligation to fence against them. The only right they have to run at large in the publick highway is given them by the town law, which may also regulate the fences, adjoining the highway; and if no town law be passed, they are not *free commoners*; (j) but their being at large in the road, is as much a trespass as if the owner of a private footway should drive his oxen therein.

It has been determined in England, that if I distrain beasts *damage feasant*, my election of a remedy is made, and an action of trespass is gone, unless they escape without my fault, or die in the pound. (k) But, by a late decision of our Supreme Court, I may abandon the distress, at any time before sale, and resort to my action of trespass, even though the cattle be impounded. (l)

He who hath the care, custody or possession of the beasts that do the damage, is liable therefor in this action. For instance, the one who hath cattle to depasture for another, or hogs in his sty, belonging to another; (m) and it is laid down in one case, that the one upon whom the trespass is committed, by such beasts, hath his election to sue the owner or the bailee thereof; (n) but it is laid down in another case, that an action, in such case, lieth against the bailee only. (o)

(i) Ante, 203.

(j) 1 Burr. 143, 4. 2 Stra. 1004.  
1 Wils. 107. 6 East, 154. 2 John.  
357.

(k) Salk. 248.

(l) 15 John. 220.

(m) Tr. Per Pais, 201.

(n) 2 Roll. Abr. 546. B. pl. I.

(o) Clayt. 33. Batemon's case.  
Vid. Bac. Abr. tit. trespass, (G) 2.

It is said by Holt, Ch. Justice, in Ld. Raym. 608, citing Poph. 161. W. Jones, 131, that trespass will not lie against the owner of a dog, that breaks his neighbor's close. But an action on the case lies for the damage which such dog doeth, if the owner have notice that he is accustomed to do mischief.(p)

2. THIS ACTION LIES, FOR AN INJURY TO THE RIGHTS OF FISHERY, AND TO LAND ADJOINING TO, OR COVERED WITH WATER.

Almost the only kinds of private fishery, known in this state, is a *several fishery*. In all the small streams or rivers of our state, that are private, not only in propriety of ownership, but also in use, and that are not a common passage for all the people, the owners of the soil through which they run, enjoy an *exclusive* right of fishing to the extent of their soil; and such owners may maintain trespass for breaking their close, against any other person exercising that right, without license.(d) But they cannot recover the value of the fish so caught.(e) This is called a *several fishery*, as well to distinguish it from a *common of fishery*, which is a right of all the people to fish in a public navigable river, as a *free fishery*, which is an exclusive right of fishing, in a certain portion of navigable waters, either generally or at appointed times. In this last kind of fishery, the owner has a property in the fish before they are caught.(f)

The grant of the land, including a river not navigable, passes the right of fishing in that river.(g)

While in this place, I shall, as well with a view to the right of *fishery*, of which I am particularly speaking, as to that of a passage by boats, rafts, &c. upon certain streams, as public highways, consider what rivers and streams are public, and what are private, and for what purposes they are public, which will include two heads of the action we are treating upon, viz. trespass for violating a *several fishery*, and trespass for passing along a private stream; for wherever there is not a public right of passage, the sailing along a stream, without license from the owner, is a trespass, the same as if one should fish, without such license, in a *several fishery*. And it is even more important to

(p) Ld. Raym. 608. Ante, 182, 3.

(d) Harg. Law Tracts. 5, 8, 11, & Hargrave's [note 181] to Co. Litt. 122. 17 John. 210, per Spencer, C. J.

(e) Ante, 159, 69.

(f) 2 Bl. Com. 39, 40. Foot, *arguendo*, 17 John. 204, 5. Harg. [note 181] to Co. Litt. 122.

(g) 17 John. 216, per Spencer, C. J.

the citizen, that the former right should be well defined and understood, than the latter.(2)

On this topic, we may gather from Lord Hale's *Treatise de jure maris et brachionum ejusdem*, edited by Mr. Hargrave, the authority of which, and its application to this state, has been established by a late decision of our Supreme Court,(h) the most of the doctrine which is necessary to be understood. The language of that author, as applicable to this subject, is, that "there be some streams or rivers, that are private, not only in propriety and ownership, but also in use, as little streams, or rivers, that are not a common passage for the people of the state. Again, there be other rivers, as well fresh as salt, that are of common or public use, for the carriage of boats and lighters; and these, whether they are fresh or salt, whether they flow and reflow, or not, are *prima facie*, of public right, common highways for a man or goods, or both, from one inland town to another." (i) He instances several rivers in England. "Thus, the rivers of Wey, of Severn, of Thames, and divers others, as well above the bridges and ports, as below, and as well above the flowings of the sea, as below, and as well where they are become private property, as in what parts they are of the king's property, are public rivers, of public right: and therefore all nuisances, and impediments of passage of boats and vessels, though in the private soil of any person, may be punished by indictment, and removed.(j)

Again: "Fresh rivers, of what kind soever, do, of common right, belong to the owners of the soil adjacent, so that the owners of one side, have, of common right, the propriety of the soil, and, consequently, the right of fishing unto the middle of the water, and the owners of the other side, the right of soil and ownership, and fishing unto the middle of the stream on their side; and, if a man be owner of the land on both sides, in common presumption, he is the owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience.(k)

In case of a river that flows and reflows, and is an arm of the sea, there, *prima facie*, it is common to all.(l) This last is what

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(2) And when the trespass is in the plaintiff's river, pond, &c. it is to be described, as an entry on the plaintiff's close or land covered with water.—Vid. 1 Chitty's pl. 175. Co. Litt. 4. b. Yelv. 143. But trespass will lie for breaking the plaintiff's close and entering his pool. Yelv. 143.

(h) 17 John. 195.

(i) Harg. Law Tracts, p. 2, 9.

(j) id. 9.

(k) id. 5. Vid. also 1 Med. 105.

(l) 1 Med. 105.



the law means by a *navigable river*, while the others, of which we have been speaking, are called in law *not navigable*, though they be common for the passage of light craft, (2 Connecticut Rep. N. S. 484,) and, under this title, they are considered, and the above distinctions and rules applied, by Lord Mansfield in *Carter v. Murcott*, (4 Burr. 2162.)(8)

“ We perceive, then, that some rivers and streams are *wholly* and *absolutely* private property, and that others are private property, subject, nevertheless, to the *servitude* of the public interest, and, in that sense, are to be regarded common highways by water. The distinguishing test between those rivers which are entirely private property, and those which are private property, subject to the public use and enjoyment, consists in the fact, whether they are susceptible or not, of use as a common passage for the public.”(m)

The circumstance, that fish generally, or salmon, frequent the river at certain seasons, furnishes no criterion, by which to determine whether it be public or private; and the only intimation to the contrary is to be found in *Stoughton v. Baker*, (4 Mass. Rep. 522) and *Shaw and others v. Crawford*, (10 John. 236) which cases are not in this respect to be considered as law in this state.(n)

Within the above doctrine, the river *Saranac*, in Clinton county, is not a public highway, for it is not navigable, for boats of any kind; and the fishery therein belongs to the owners of the soil on each side, as it might indeed, although it were a public highway, within the rules we have been considering.

Although a river be a public highway, the citizen has no right at common law, to tow on the banks thereof, (the banks of the river *Ouse* in England, for instance) 3 T. R. 253.

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(8) These rules of the common law have not been adopted in Pennsylvania; and a man cannot have an exclusive right of fishing in the *Susquehanna*, and other large rivers in that state, though he own the soil adjacent. (2 Binney, 475.) Such rivers are navigable, even above tide water, (id.) But this doctrine of the common law has been unqualifiedly adopted in Connecticut, in its application to *Connecticut river*, upon which the owners of adjoining lands, above the ebbing and flowing of the tide, have an exclusive right of fishery, opposite their land, to the middle of the river; and the publick have an easement in the river, as a highway, for passing and repassing with every kind of water-craft. (2 Con. Rep. N. S. 481.)

(m) 17 John. 211. per Spencer C. J. & vid. 3 Caines, 319.

(n) 17 John. 211, per Spencer, C. J.

The mere act of clearing out a fishing place in a public river, (the river *Delaware*, for instance, in the town of *Minisink*, in Orange county,) does not give such an exclusive right of fishing there, as to enable the one, who thus clears it, to maintain an action for intruding upon such ground. (o)

For violating a man's right of fishery, in his private pond, formed for the purpose of keeping fish, he may of course have an action, not only for breaking his close, but also to recover the value of the fish. (p)

3. THIS ACTION LIES FOR BREAKING THE PLAINTIFF'S CLOSE, IN HUNTING OR THE PURSUIT OF GAME.

Any man may justify going upon the lands of another, in pursuit of ravenous beasts, as bears, wolves, foxes, badgers, &c. upon principles of public benefit ; but this will not justify a person in breaking the ground and digging for them ; (q) and, if unnecessary mischief be done in the pursuit, trespass lies, and, this being an entry given by the law, the hunter becomes a trespasser from the beginning, by such abuse of his privilege ; (r) and it is only in these cases that the law will authorize the entry, but not in hunting hares, deer, &c.

4. THIS ACTION LIES IN VARIOUS CASES against parties, THEIR attorneys, agents, OR servants, AS WELL AS AGAINST officers AND ministers of justice, ACTING UNDER COLOUR OF LAW OR OF legal process.

These cases are mostly reducible to three kinds ; viz.

1. Where there is a want of jurisdiction in the court of magistrate, who issues the process.

2. Where, although they have jurisdiction, yet the proceedings are void for irregularity.

3. Where the officer, having process to execute, exceeds his authority.

1. WHERE THERE IS WANT OF JURISDICTION, &c.

1. Jurisdiction signifies an authority or power, which a man hath to do justice, in causes of complaint brought before him : (s)

(o) 12 John. 420.

(p) Ante, 180.

(q) Cro. Jac. 321. 1 T. R. 334.

3 id. 259, note.

(r) 3 Bl. Com. 113, 14.

(s) Jac. L. D. JURISDICTION.

and we have already noticed the cases in which a justice has jurisdiction, with some of the consequences which arise from his acting in cases, where there is a want of such jurisdiction. (t)

It is clearly agreed by all the authorities, that where a court or magistrate tries a *cause*, of which they have no jurisdiction, all they do is void, and the same as if it had never been; and not only the court or magistrate and party, but all officers, and others, who are engaged in carrying the same into effect, are trespassers. Thus, should a man be arrested, or should his close be entered, or his goods taken, by process of execution from such a court, he might sue not only the party and his attorney, but the members of the court, or the magistrate, and even the officer who serves the process, in an action of trespass for the injury. If his body be taken, it is an assault and false imprisonment; if his lands be entered, it is an illegal breach of his close; and if his goods be taken, it is a trespass or conversion, for either of which injuries an action may be brought, against all, or any of those persons, who have been the instruments for effecting the injury. (u) Thus, should a court of common pleas, try a man for a felony or other crime, at the suit of the people, where the *Oyer and Terminer* or *General Sessions*, alone, have jurisdiction; (v) or a justice try a man for murder, (1 Con. Rep. N. S. 45,) or should a court, authorized by statute to give judgment for certain revenue duties, on *strong wines*, perfectly made, proceed to adjudge that *low wines* were of this description, and give judgment against the defendant for the duties upon them; (w) or should a justice try, and give judgment, in an action of assault and battery, false imprisonment, slander, or other cause, of which he has no jurisdiction; (x) and so of the like cases; all is void.

It is the same, if the court have no jurisdiction of the party, (4) as if an army court martial should arrest, and try a citizen of the United States, not on military duty as a spy; (y) or a militia court martial, should fine a man, who is by law exempt from doing militia duty. (z) And so of an arrest (and consequent trial, by a court martial) of an inferior officer, by his superior (both being under martial law) made under color, but not within the scope of military authority, as for refusing to attend a writing school, established in the army, or not paying his share of the tax to the school master; (a) on the ground that the superior officer had no jurisdiction of the cause. So, where a

(t) Ante, 1 to 13.

(u) 10 Rep. 76. Hardr. 480. 15 John, 157. 2 Con. Rep. N. S. 45.

(v) 10 Rep. 76.

(w) Hardr. 480, & vid. 2 Wils. 384.

(x) 15 John. 493

(4) 10 Co. 76. 1 Con. Rep. N. S. 45.

(y) 12 John. 257.

(z) 3 Cranch, 331.

(a) 4 Taunt. Rep. 66.

court rendered judgment against one, as an administrator, who was appointed such by the ordinary, while an executor was absent, who had a right to act, it is void, on the ground, that the ordinary has no right to appoint an administrator, while there is an executor living, though he be incapable of acting by reason of absence. (b) Here the ordinary has no jurisdiction of the cause, and the court, who render the judgment, have neither jurisdiction of the person proceeded against, nor the property levied upon under their execution, and hence all the proceedings are void. So where the trustees of a school district levy a tax on a person or property not taxable, and issue their warrant, it will not even protect the collector. (13 John. 444, and vide 1 H. Bl. 68. 4 Taunt. 634.)

It is the same, if a court do an act beyond the limits of its territorial jurisdiction, as if a justice should issue process, or try a cause, or render judgment out of his county. (c)

And the reason why the process issued in these cases will not protect the officer, is, that the court or magistrate have no jurisdiction whatever, and it is the same, as if the process had been issued by a common person, having no commission. (d)

The same consequences follow, if a justice have no jurisdiction of the process; (5) as if he should issue a warrant to search for stolen goods, without describing them, or particularizing the place to be searched: or a warrant authorizing the officer to search all suspected places, or all suspected persons, (1 Con. Rep. N. S. 40,) or if a justice, or other court, merely having power to issue process *in writing*, should give order, *by parol*, to have the party brought into court, to answer the plaintiff. (Hob. 63. 1 Con. Rep. N. S. 45. 2 Wils. 386.)

But where a justice, who is a tavern keeper, tries a cause, and issues execution, it was intimated by the Supreme Court, that although he was himself liable as a trespasser, for the imprisonment of the defendant, or taking his goods in execution, &c. yet the constable would, *probably*, be protected by the process. (e)

## 2. OF PROCEEDINGS VOID FOR IRREGULARITY MERELY.

2. Where a justice is acting within his county, in relation to a cause and process of which he hath jurisdiction, and to parties of

(b) 8 Cranch, 10.

(c) Cro. Car. 213, & vid. 5 East, 233.

(d) 17 John. 145, 6. 2 Wils. 384. 1 Con. Rep. N. S. 45.

(5) Vid. 1 Con. Rep. N. S. 44, 5, and the cases there cited by judge Reece.

(e) 2 Caines, 108.



whom he hath also jurisdiction, although he may commit some irregularity, for which he, or the party might be subjected to an action of trespass ; yet the officer, who is to execute his process, would clearly be protected and justified by such process, unless it be a nullity upon the face of it. (f)

An irregularity is, either the *omitting* to do something necessary for the due and orderly conducting a suit or legal proceeding, or doing it in an *unseasonable time* or *improper manner* (g) *Error* is, where the court or magistrate hath jurisdiction, and the act done, being judicial, is regular, and within such jurisdiction, but there is a mistake of the law committed, as to the manner of doing it.

A justice is limited, by the statute, to a certain course of proceedings ; and unless those proceedings are adhered to, or waived by the party, who has a right to insist on them, the judgment is irregular and void. Thus, suppose a justice should give judgment against a man, who is not in court, and had had no notice by summons to appear, the judgment would be void, on the ground of irregularity. No action of debt would lie upon it, (h) and if enforced by execution, the justice and plaintiff would be trespassers, beyond all doubt ; and, undoubtedly, the same consequence would follow, if he were to give judgment before the return day of the summons ; and so if he should issue an attachment without swearing a witness. (i) But on the other hand, suppose the parties to have been before the justice, or, that the defendant had due notice, and that the justice had then given judgment, upon insufficient proof, or upon the evidence of the plaintiff himself, in either case, as he is acting in a judicial character, having jurisdiction, and the proceedings being all regular, such judgment would be *erroneous* :—it would be *error*, not *irregularity*, and it would be a valid and binding judgment, until reversed by *certiorari*, or on *appeal* ; and so, though he should give a judgment for more than *five dollar's* costs in favour of the plaintiff, he being limited to that amount by the act, he has power to give judgment for *costs*, and the giving judgment for too much, is a mere *error*, and not such an *excess* of jurisdiction, or irregularity, as would render the proceeding void ; (j) and so in the case of the issuing an attachment, without swearing any witness, although such act would be void yet, if he acted erroneously, by issuing it on insufficient proof, where

(f) Vid. Esp. Dig. N. York ed. vol. 1. pt. 2. 275.

(g) Tidd, 434.

(h) 15 John. 244.

(i) 11 John. 175, & vid. 14 John. 246.

(j) 17 John. 145.

a witness is duly sworn pursuant to the act, this would be merely error, and no irregularity. *(k)* But such proof ought to be at least *colourable*, or it seems he would be a trespasser, *(l)* for mere report or information, which he has heard, or what he knows himself, will not save him from being liable in trespass, nor would the return of a constable, that the defendant was not to be found, upon an execution in another cause, be considered any proof. *(m)*

A certiorari delivered to a justice, who is proceeding to try and determine a forcible entry and detainer, suspends his powers, and if he still proceed to give the party restitution, he is a trespasser. (2 John. cas. 27.)

For what is merely error of decision, jurisdiction and irregularity, being out of question, no action will lie, against any Court, Judge, or Magistrate, nor any officer acting under such authority. *(n)* But for an irregularity, either in a court of record, or a justice's court, the party who commits the irregularity, and all those acting in his behalf, are liable as trespassers; for all proceedings subsequent to such irregularity in a point upon which they depend, are void, unless waived by some act of the party who has a right to take advantage thereof. *(o)* But no action lies for an act, under any irregular proceeding or judgment in a court of record, until the same be set aside by rule of the same court, on motion; *(p)* though it is of course otherwise, as we have seen, with regard to a justice's and other inferior courts.

But though there be an irregularity in issuing the process, it will protect the officer, in any act he may do under it, whether it issue from a justice, or other court; and in case of irregular process, issued by a court of record, none but the party, his attorney, &c. are liable; for it is considered their act, and not that of the court. *(q)* But this is otherwise, in case of inferior magistrates. They are *themselves* liable, as well as the party, &c. though their process will protect the officer to whom directed, as effectually as if issued from a court of record. *(r)*

But a constable must act within his territorial jurisdiction, which is the county where he is chosen, or he will be a trespasser. (1 H. Bl. Rep. 15.)

*(k)* 17 John. 146, *per Curiam*.

*(l)* 11 id. 177, *per Thompson*, Ch.

*(m)* id.

*(n)* 5 John. 282 9 John. 395. 3 Caines, 170. 13 John. 444. 1 Caines, 91. 13 John. 436, 7.

*(o)* Vid. cases cited, Esp. Dig. N. York ed. vol. 1. pt. 2. 275.

*(p)* 3 Caines, 267.

*(q)* Vid. cases cited, Esp. Dig. vol. 1. pt. 2. 275, N. York ed.

*(r)* id. & vid. 2 Caines, 108.

### 3. WHERE THE OFFICER, HAVING PROCESS TO EXECUTE, EXCEEDS HIS AUTHORITY.

3. We refer, for the most of this head, to the remarks we shall make as to the service of process. It is proper to observe here, however, that the party who sues out process, from a competent court, is responsible only for the validity of the process, and for good faith in suing it out; but is not answerable for the acts of the officer to whom it is directed and delivered, by him, beyond the authority of the precept, unless done by his direction. Thus, if a sheriff serve an attachment, execution, or other process after the return day, without the direction of the plaintiff, the officer alone, is accountable: and, if a subsequent assent on the part of the plaintiff, would make him a party to such trespass, of which there appears to be some doubt, yet it should be plainly and clearly proved.<sup>(s)</sup> The same remark will apply to a justice, issuing his process to a constable; he is not accountable for the constable's abuse of his authority; as if a constable should take the defendant's arms and accoutrements, upon an attachment.<sup>(t)</sup>

One word, however, under this head, as to the rights acquired under a delivery of, or levy upon an execution; which, from the frequent conflict of those rights with other claims, often give rise to the action of trespass, or trover. We shall see, in its proper place, what constitutes a levy upon an attachment or execution; and what I propose mainly to notice here, is, certain properties in a sheriff's execution, issued out of the Supreme Court, or Common Pleas, called a *fieri facias*, by which it is distinguished from a justice's execution, in its operation upon the goods and chattels of the defendant. These writs of *fieri facias* are frequently tested, (witnessed and dated) back, at a day long preceding the time of their issuing. If issued, when the court out of which they issue, is in session, they should be tested, as of some day in that term.<sup>(u)</sup> If issued in vacation, they should always bear test as of some day in the preceding term, and they are, generally, (though not necessarily so.) <sup>(v)</sup> made returnable at some day in the same term at which they issue, or the next term thereafter. If issued in vacation, they are usually returnable the next term.<sup>(w)</sup>

At the common law, this writ of *fieri facias*, upon its being delivered to the sheriff, had a retro-active effect, and bound all the goods and chattels of the party, against whom it issued, from the test. So that, where a defendant had sold his goods and

<sup>(s)</sup> 9 John. 117.

<sup>(t)</sup> 14 id. 246.

<sup>(u)</sup> 16 id. 145.

<sup>(v)</sup> 2 Salk. 700.

<sup>(w)</sup> Vid. 9 John. 336. 2 Burr.

chattels, or any of them, there being a judgment against him, although the purchaser acted in perfect good faith, and gave a full consideration for them, yet upon a *fieri facias* delivered to the sheriff, several months afterwards, he might levy upon, and take these goods and chattels, so sold, out of the hands of the purchaser, and sell them to pay the judgment debt.(x) And this, although the purchaser had no notice whatever, that there was any judgment against the vendor. To lessen this evil, the statute, 29 Car. II. ch. 5, s. 18, was passed, of which our statute (1 N. R. L. 501, s. 6,) is substantially a transcript. This statute provides, that the goods of the party shall be bound by such *fi. fa.* or other writ of execution, only from the time of its delivery to the sheriff, &c.

The goods are still bound, as at common law, from the test of the execution, unless they are *bona fide* sold by the party, between the test and the delivery thereof to the sheriff; so that, if any person take them away from the defendant, tortiously; (y) or, if the defendant die, after the test, and before the return,(z) although at the time of such tortious taking, or death, the *fi. fa.* be not in the sheriff's hands, yet upon receiving it afterwards, he may pursue and seize them, in the hands of the *tortfeasor*, in the first case, or in the hands of any person who hath the goods of the deceased, in the last instance. And they are thus bound from the test, notwithstanding the execution may have been delivered to the sheriff, after the goods are thus taken away, or after the death of the defendant;(a) and so of any other disposition made of the goods, by the defendant, or any other person, short of a *bona fide* sale of them.(b) And since the above mentioned statute, they are bound in the defendant's hands, after the delivery of the *fieri facias* to the sheriff, who, if they are sold *bona fide*, after the delivery of such writ to him, may seize them in the hands of the purchaser. But it is otherwise, if sold *before* such delivery, though after the test.(c) And a sale of goods upon a nominal consideration expressed, in trust to pay *bona fide* creditors, is a valid and binding sale within this rule.(d)

But neither before the statute nor since, is the property of the defendant divested by the delivery of the *fi. fa.*; and, of course, the sheriff has no property in the goods, which will entitle him to maintain trespass or trover, against a person who

(x) 12 John. 406, per Spencer, J.

(y) 12 id. 403.

(z) 7 T. R. 20. Vid. Willes, 135.

(a) 12 John. 403. 7 T. R. 26.

(b) Ld. Raym. 252, per Holt. Ch.

J.

(c) 12 John. 403. Ld. Raym. 252.  
Com. Rep. 35.

(d) 2 Binney, 186, 7.



takes and converts such goods, unless he have made an actual levy upon them (e) What is meant by the goods being bound, is, merely that the sheriff has a right to levy upon them, and thereby acquire a property in them. (f) But should he omit to do this, till after the return day of the execution, he loses all right, and cannot afterwards make a levy, or otherwise reclaim either the goods or the price of them; (g) though, where he has levied in time, he may complete it by sale, after the return day. (2 Caines 243.) Thus a sale after the sheriff has received the execution, or any other disposition of the goods, after the test, remains altogether unaffected and uninfluenced by the execution; and indeed the property in the goods, which remain in the defendant's hands, continues unchanged, until levied upon by the sheriff. (h)

Upon this principle is it, that where a sheriff hath two writs of *fieri facias* delivered to him, yet, if he make the first levy upon the one which is the last delivered, and sell the goods upon such junior execution, the sale is a valid one, as it regards the purchaser under it, who may hold the goods which he buys, and the plaintiff in such younger execution is entitled to the money arising from the sale, notwithstanding the older execution in the sheriff's hands, at the time of the levy and sale. The plaintiff, in the older execution must, in this case, seek his remedy against the sheriff only, who ought, unless there be some circumstances to excuse him, (a direction from the plaintiff not to levy, for instance) to give the execution first delivered to him, the preference. This is a question, however, resting between him and the plaintiff in the senior execution, and between them alone. And this very point was decided in a case in Com. Rep. 35. Ld. Raym. 251, S. C. Salk. 320, S. C. &c.

But this principle has been pursued farther. Suppose a sheriff receives a *fieri facias* to day, at your suit, against *John Doe*. After this, and during the life of your execution, I obtain a judgment against *Doe* before a justice, sue out and give my execution thereupon to a constable, who gets the start of your officer, in a levy under my execution, upon the goods and chattels of *Doe*: Does your execution so far bind the property of *Doe*, being delivered to the sheriff before I got mine into the hands of the constable, as to enable the sheriff to divest my

(e) 12 John. 407, per Spencer, J.  
2 Eq. Cas. Abr. 381. 4 East, 536, 7,  
per Ld. Ellenborough, C. J.  
(f) id.

(g) id. & vid. 2 Caines, 243. 9  
John. 132. 13 id. 255.

(h) id. & vid. 8 East, 474. Tay-  
lor's Rep. 131.

right, seize the goods of *Doe*, and take them away from my constable? The decision in the late case of *Payne* against *Drewe*,<sup>(i)</sup> recognized as authority by our Supreme Court in *Hotchkiss v. M'Vickar*,<sup>(j)</sup> and based upon the decision above quoted from *Comyn, Ld. Raymond and Salkield*, enable us to answer this question unhesitatingly in the negative. In that case, after a most full, able and satisfactory consideration of the authorities. Lord ELLENBOROUGH, Ch. J. denies that a writ, which is from the delivery immediately binding, as against the defendant, so as to tie up his hands from alienating the goods, which might be seized under it, is to be regarded as in effect self executed, by its own proper legal effect and force, for all purposes: and the case itself decides, that it is not so, for the purpose of divesting a levy made upon an execution in other hands, upon which a levy is first made, though *posterior* in its delivery to the one in whose behalf this binding consequence is claimed. That was an action, brought by *Payne* against *Drewe*, the sheriff, for a false return to a writ of *fiery facias*, in favour of *Payne*, against the goods and chattels of one *Sturt*. A writ of *sequestration* issued out of the Court of Chancery, was not only tested but actually delivered to the *sequestrators* to be executed, sometime before the plaintiff's *fiery facias* had been delivered to *Drewe*, who levied upon the goods of *Sturt* to an amount sufficient to satisfy *Payne*'s execution; but afterwards having notice of the *sequestration*, he supposed that it bound *Sturt*'s goods and chattels from its delivery, and that, therefore, *Sturt* had nothing which he could hold under his writ, and he returned to the *fiery facias*, that no goods were to be found. The *sequestration* had not, however, been actually levied, so that the sheriff had the *earliest* levy, though upon the *youngest* execution. Lord ELLENBOROUGH, for the sake of the argument, conceded that the *sequestration* had all the binding force upon *Sturt*'s goods, &c. which a *fiery facias* would have had at the common law, but, that notwithstanding the *fi. fa.* being first levied, would hold against it; that the sheriff had a right, and should have proceeded to sell under the *fi. fa.* in defiance of the *sequestration*: and that not having done so, he was liable for the plaintiff's debt. He concludes his argument, by laying down this rule: *That, where there are several authorities, equally competent to bind the goods of a party, when executed by the proper officer, they shall be considered as effectually, and for all purposes bound by the authority, which first actually attaches upon them in point of execution, and under which an execution shall have been first executed.*<sup>(k)</sup>

(i) 4 East, 523.

(j) 12 John. 403.

(k) 4 East, 545, per *Ld. Ellenborough*, C. J.

We may then say, under this rule in relation to all conflicting executions, and process in the nature of executions, as the Supreme Court have said, in relation to justice's execution—"That the time of making the levy, *only*, can control the right to the property, and that alone can create the *lien* : it then, and not before, is properly in the custody of the law." <sup>(l)</sup>

Indeed, the point once being gained, that goods are reduced into the custody of the law, by an execution, *only* from the time of an actual levy, the above authorities do but follow up the ancient principle, that goods in the custody of the law, cannot be taken by execution or distress. <sup>(m)</sup>

The above rule of Lord ELLENBOROUGH, will obviously have a very extensive operation, embracing seizures or distresses for rent, of goods damage feasant, goods under an attachment, and warrants for seizing goods under the militia law, tax law, common school act, &c. &c. as well as executions against goods from all the different courts.

#### 5. OF TRESPASSES COMMITTED BY TAKING OUT, AND EXECUTING SEARCH WARRANTS, AND OTHER CRIMINAL PROCESS.

5. Trespass lies against a person, who takes out, and enters another's close under a search warrant, to search for goods, if no goods be found in the place searched. (2 Haw. pl. crown, ch. 13, s. 17, n. (6) 11 St. Trials, 321. 2 Hale, 113, 151.)—But the magistrate granting the warrant is justifiable, though no goods be found, if the following circumstances are complied with, viz. 1. An oath, that the goods are feloniously stolen ; but it is unnecessary for the warrant to recite who owns the stolen goods. <sup>(n)</sup> 2. The person complaining, or some other witness, must state under oath, that he knows, or suspects they are concealed in the place to be searched. The constable, or officer to whom it is directed, will be justified, if he execute it in the day time, and in the presence of the party informing, even though the goods, be not found at the place of search. <sup>(o)</sup>

In point of form, the warrant should recite the complaint, and the proof on which it is grounded ; and point out the place to be searched particularly. It should, moreover, describe the goods, for which search is to be made ; and it may

<sup>(l)</sup> 13 John. 251, per Yates, justice.

<sup>(n)</sup> 10 John. 265.

<sup>(m)</sup> Show. 173, per Holt, C. J.

<sup>(o)</sup> Hale's P. C. 150. 10 John

Willes, 136, per Willes, Ld. C. J. Co. 265.

Law. 47. a.

farther command the officer to bring the person, in whose custody they shall be found, before the justice issuing the warrant. The officer executing it may, for that purpose, break open either the outer or inner door of the house to be searched, after demanding admittance and being refused, (p) and so he may break open trunks, chests or boxes, if the key be refused on demand. (3) It is proper to notice, that the various privileges from arrest as to person, time and place, which we shall have occasion to notice in relation to the execution of civil process, do not exist in the case of criminal warrants for arrest in any instance. (q) Vid. post.

I have, thus far, avoided the discussion of the various conflicting claims, which frequently arise, between *heirs* and *personal representatives*, between *reversioners* and *remainder-men*, and *their heirs* on the one hand, and *particular tenants*, and *their personal representatives* on the other, in relation to fixtures, timber, emblements, &c. and all questions of the like nature.— And I shall pursue the same course hereafter ; because an investigation of these rights necessarily involve questions of title to the lands, with which they are connected, which questions are forbidden to a justice, according to the notion of his jurisdiction, which we advanced at the outset. (r)

Indeed, it is proper to remark, before we close this head, of trespass upon real property, that the power of a justice to try the title of real estate, is confined by the terms of the statute, to a single instance, and that instance must arise in a particular form of action ; viz. *trespass on lands*, &c. A title is defined to be, *the means, whereby the owner of lands, hath the just possession of his property*. (s) And there are several stages or degrees, requisite to form a complete title to lands and tenements. (t) These are divided into a *naked possession*, a *right of possession*, a *mere right*, and a *mere right joined with actual possession*. (u)— Of these four degrees of title, the lowest and most imperfect, is the mere naked possession, or actual occupation of the estate, which may happen in a variety of ways, without any right of possession to, or right of property in, the subject of controversy. But, in the mean time, till some act be done, by the rightful owner, to divest such possession, though it be wrongful, it is, *prima facie*, evidence of legal title in the possessor ; (v) and if

(p) 1 Connecticut Rep. new series, 40. 10 John. 263.

(3) Vid. 1 Chitty's Criminal Law, 66.

(q) Vid. id. 12.

(r) Ante 14, 15, 16, & vid. Cox's N. J. Rep. 177. id. 217.

(s) 1 Inst. 345.

(t) 2 Bl. Com. 195.

(u) id. 195 to 199.

(v) id. 195, 6.



the defendant mean to do away this evidence, by shewing the right to be in another, he must interpose his plea of title, in the manner we shall hereafter notice. This right of inquiring thus far into title, is confined to the action for an injury to the lands, by the commission of a trespass. This is the plain meaning of the statute, which prohibits a justice from taking cognizance of any action, wherein the title to lands shall in any wise come in question, (except as aforesaid) (w) and provides, that even in this action, where any thing beyond this lowest species of title, is brought in question, it shall be done by a special plea of title, which, of itself, removes the cause to a higher tribunal. (x) The moment the question is asked, therefore, in the second, third or fourth degree, by what right or means, does the party hold or claim a possession? and the decision of the cause depends upon this question, the jurisdiction of the court is at an end, be the form of action what it may. This brings me to speak,

**Secondly, OF THE ACTION OF TRESPASS, IN RELATION TO PERSONAL PROPERTY.**

In this action also, the plaintiff must, in order to recover, show himself entitled to a general, special or qualified property in the subject of controversy, the doctrine in relation to which, is the same as in trover. And, to the remarks on this subject, already made, under the head of trover, and in divers other parts of of this work, the reader is referred. (y) To go into the subject here, would lead to a troublesome and unnecessary repetition. Vid. ante, 157, 159, 60.

There is but a single case, that I remember, where trespass will lie for taking personal property, in which trover may not also be brought. And the most of the following remarks, under this second general division of the action of trespass, are, therefore, in fact, an enlargement of the head of trover, as well as trespass. (z) But the remark that trover will lie for taking personal property, wherever trespass may be brought, will not hold *e converso*: for trespass pre-supposes an unlawful taking; whereas trover, we have seen, will lie, whether the taking be lawful or not, if the property in the goods or chattels converted, is not passed away by the owner. The exception to the above rule, that where trespass will lie for a taking, tro-

(w) I N. R. L. 387, s. I.

(x) id. 390, s. 7.

(y) Vid. Bac. Ab. tit. Trespass,

(C) 2. vid. also I Chitty on pl. 165 to 169.

(z) id. & vid. 3 Wils. 36.

ver may also be brought, is where I have taken your property wrongfully, or am otherwise in possession of it, having no title to it: I may maintain trespass, against any one who takes it from me, except you, and succeed, when at the same time, if I should bring trover, he might defeat my action, by showing a title in you (a) :

Thus, trespass or trover will lie, in the case of a distress for rent, where there has been an illegal taking; as for distraining when no rent was due, or taking implements of trade, or beasts of husbandry, when there was a sufficiency of other property; (b) or a horse while his rider was upon him; (c) or, if a distress be made for rent, the outer door being shut, or if the distrainor expel the tenant. (d) For the statute (1 N. R. L. 436, s. 10,) which enacts that a party distraining for rent shall not be a trespasser from the beginning, only relates to irregularities after a lawful taking. (e) So, that in all those cases, which we have before noticed under our first general division of this head, as well as in other cases where a license or authority is given by the law, to take personal property, and there is an abuse of such license or authority, the party injured may not only prosecute his action of trespass for the illegal entry from the beginning, but he may also sue in trespass or trover and recover the value of the goods, though we have seen it is otherwise where the license to take the goods is given by the party. (f) Where there is an abuse of the right to take goods under an authority or license from the party, and such right is abused, we shall presently notice such instances of such abuse, as will lay the foundation of an action of trespass, and in the mean time shall proceed with our enumeration of such cases of original taking, as will warrant this action.

We have said that trespass or trover will lie for an unfounded distress. This part of the subject requires a more particular consideration. I shall therefore notice,

1. When and how a party hath a right to distrain for rent, and how the distress is to be disposed of.

2. What may be distrained therefor, and,

3. Shall here receive some farther attention than what I have already done, on the subject of distresses damage feasant.

(a) Vid. authorities cited in I. Chitty on pl. 168. Ante, 157, 8.

(b) F. N. B. 88. 4 T. R. 565, 1 Burr. 579.

(c) 6 T. R. 138. 4 T. R. 569.

(d) 1 East, 139.

(e) 1 H. Bl. 13. 1 Esp. Rep. 382, 3.

(f) Ante, 201, 2.

1. WHEN, AND HOW, A PARTY HATH A RIGHT TO DISTRAIN FOR RENT, &c.

1. A lessor, having no reversionary interest in the land demised cannot distrain for the rent due from his tenant, unless there be an express reservation of the power to distrain by the landlord in such case, or an agreement to that effect, between him and his tenant; for, without such reservation or agreement, the right to distrain is inseparable from the reversion. (g) This is a general legal rule, and no custom in this state, will in this, or any other case be allowed, to control the general rules of the common law; unless, indeed, where a custom is of such antiquity, that we cannot trace its origin; for it is then coeval with the common law itself; and, in such case, it forms an exception to the general rule; because, there is a ground to presume that it is of equal authority, and that the same power, which established the rule, also made the exception. (h) These points were determined in the late case of *Prescott v. De Forest*, (16 John. 159.) *Stewart* demised a house, in *Pearl street*, N. Y. to *Satterlee*, for one year: *Satterlee* leased to *Prescott* the same house, for the same term, for \$1000 rent, payable quarterly, excepting the front room, which he (*Satterlee*) occupied for a store. Before the end of the first term, *Satterlee* took a lease for another year of *Stewart*, for the same premises. Before *Prescott's* term expired, only a small part of the quarterly payments having been made, *Satterlee* distrained the tenant's goods for the balance due, and regularly advertised and sold them to *De Forest*, who bid them off at auction, against whom *Prescott* brought an action of trover; and it was holden that the plaintiff might recover, because *Satterlee*, having no right under the circumstances to distrain, not only himself but the purchaser were wrong doers and accountable for the value of the goods.

This case establishes the rule, that wherever there is no authority to take goods by distress, (and the same rule of course would extend to executions, attachments, and the like,) not only the landlord, bailiff, or other officer, so taking and exposing the goods to sale, but the purchaser, or any person into whose hands the goods may come, are accountable to the owner for the value. But trespass would in such case lie against the first takers only and their agents. (i) The action should be *trover* against the innocent purchaser, who had no agency in the taking, as in the above case of *Prescott v. De Forest*. (j)

(g) Woodf. L. & T. 380 .81. 16 John. 159.

(h) 16 John. 160, 1, per Platt, J.

(i) Vid. Chitty on pl. 170, & cases there cited. 6 John. 44.

(j) id. 6 John. 44.

I shall not go beyond the above case, in illustrating the rule, that the right of distress belongs inseparably to the owner of the reversion ; because I believe, that the judgment, in that case, would have been reversed upon another ground, even had the justice decided correctly in the court below, on the question of a right in the lessor to distrain. My reason is, that such right depended entirely on the question, what title had the lessor to the land, upon which he distrained ? It was not like the action for use and occupation ;(k) or for rent reserved upon a sealed lease ;(l) or for *mesne profits*, consequent upon the recovery in ejectment,(m) where the defendant is estopped to dispute the title to the land, out of which the claim arises ; but it is an action of trover, in which, the *title* to the goods, depends upon the *title* to the lands (n) No matter what the interest, which depends upon the *title* to be proved, whether it be in fee, for life, for a year, month, or day ; every *interest in lands* is derived from some kind of title ; and the moment this comes in question, except the *title* inferable from *actual occupancy*, the jurisdiction of the justice ceases. And, although the reversion and tenancy, in the case we have been considering, both depended upon the operation of a lease and assignment for a very short term, yet both a lease and assignment belong, in the law, to the class of *title by alienation*.(o) But, had there been a reservation of a right of distress, or an agreement to distrain, it would have resolved itself into a mere matter of *personal authority* or *contract*, in which case the justice would have had jurisdiction.(p)

But, in general, the tenant either has no defence which goes to the landlord's title, or, if he has, he is estopped to use it, for the law will, in very few instances, allow the tenant first to enjoy the land, and then turn round and pry into his lessor's title. (q) I shall, therefore, dismiss the subject of a distress for rent, after having noticed the time and manner in which such distress may be made, and the things which are distrainable, with one or two cases of *right* depending on questions distinct from *title*.

A man may distrain goods, as my bailiff or servant, without any express authority from me, either written or verbal, and, if I afterwards assent to such act, it shall be a good distress for

(k) 1 Esp. Dig. N. Y. ed. 59. 5 T. R. 4.

(l) Vid. Woodf. L. & T. 410.

(m) 11 John. 205. 2 John. 369.

(n) Vid. Cox's N. J. Rep. 177, 217. Ante. 14, 15.

(o) Vid. 2 Bl. Com. 237, 317 & 326.

(p) 10 John. 169.

(q) Vid. Woodf. L. & T. 2 London ed. 206, 380, 596. 1 N. R. L. 94.



my benefit ; for such assent shall have relation to the time of the distress taken.(r)

A distress for rent, cannot be made in the night, (which is from after sun set, till sun rise.) It cannot be made before the rent fall due, and the distrainor must wait, till after midnight of the day appointed for payment.(s) . It must not be made after a tender of payment, and such tender, after distress, but before impounding the goods distrained, will render the detainer illegal ;(t) though this would not be the effect of a tender after the distress is actually impounded.(u) N. B. A tender upon the land demised, whether the rent be payable in money or any thing else, is a good tender, unless another place be pointed out by the lease. (16 John. 222.)

At common law, a lessor could not distrain, after the determination of the lease, but he may now, by statute, do this, at any time within six calendar months thereafter, if both his title, or interest, and the tenant's possession of the premises, continue to the time of distraining.(v) The lessor cannot distrain the tenant's beasts which are upon his (the lessor's) own land, or in the public highway, and so if the beasts go off the demised land, before the distrainor observes them, he cannot distrain them, though it would be otherwise where, after he had seen them, the tenant should drive them off, to keep them out of the way. And now, by statute, the tenant's *own* goods may be distrained, at any time within thirty days, after being removed off the premises ;(w) and, by a still later statute, such goods so removed off the premises, may be distrained at any time within thirty days, after the rent falls due, even though they have been *bona fide* sold, or rather this statute contains no exception, like the first, in favour of a *bona fide* purchaser.(x)

Where there are separate demises, there ought to be separate distresses, on the several premises subject to the distinct rents ; for no distress on one part, can be good for both rents ; but it would be otherwise, with regard to separate premises, under the same demise, though they lie in different counties ; in which case a distress may be taken in either county for the whole rent ; and a chasing of the distress from one county to the other, would be a continuance of the taking, though this would not be legal where the counties do not join.

(r) Gilb. L. of Dist. 32. Woodf. L. & T. 392.

(s) Woodf. L. & T. 391.

(t) id.

(u) 5 T. R. 432.

(v) 1 N. R. L. 438, s. 17.

(w) id. 437, s. 13.

(x) Laws, sess. 41, ch. 227, s. 6.

A seizure of part of the goods in the house, in the name of the whole, is a good seizure of all.

Distresses ought not to be excessive, and if they are, an action on the case lies ; but not trespass. The cases put by the books to illustrate the notion, where a distress is excessive, are, however, very strong ones ; as where a person distrains two oxen for 12*d.* or if he distrain a horse or ox for a small sum where a sheep or swine may be had. But if there be no other distress on the land, then the taking of one entire thing, though of never so great value, is not unreasonable.

In all cases of distress, which is considered as a mere pledge, the owner may of course reclaim his goods, on a tender of the money, or damages, for which they are holden, at any time before sale.

When the first distress is insufficient, the lessor may distrain again, though, it is said, he shall not do this, if a sufficient distress was to be found, which he neglected to take.

If a distress be made for rent which is not due, the owner may recover double the value of the goods distrained with costs, (y) and, if it be made without any cause, the owner may rescue it, at any time before it is impounded. A distress cannot be made for the interest due upon rent, but only for the principal sum ; and if such interest be collected by distress, the party distrained upon, may recover back the excess in an action on the case. (z)

The distress is to be put in a pound *overt*, or *covert*, as in case of a distress *damage feasant*. (a) It is not to be driven out of the county, except as before mentioned, nor impounded in several places, and notice of the place is to be given to the owner, who is to feed the beasts at his peril, and living chattels ought, regularly to be put into a *public pound overt*, though they may be put into a *private pound overt*, if the distrainer will take the charge of keeping them. But dead chattels should be put in a pound *covert*, for the distrainer is liable, if they are lost by his neglect, or if they be damaged from the same cause.

The offence created by the statute (b) of impounding in several places, or a wrong place, however, is but a single offence, and shall be satisfied with one forfeiture, and, although several be concerned in the offence, but one forfeiture can be recover-

(y) 1 N. R. L. 436, s. 9.  
(z) 6 John. 43. 2 Binney, 159.

(a) Vid. ante, 205.  
(b) 1 N. R. L. 93, s. 7.

ed of them, i. e. one penalty, and one treble damages. By this statute, no distress is to be driven out of the town, &c. where taken, except to a pound overt within three miles of the place where taken, nor shall such distress be impounded in different places, upon pain of ten pounds fine, and treble damages, &c. (Vide 1 N. R. L. 93, s. 7.)

The public pound keeper is not answerable, in an action of any kind, for receiving and keeping the distress, even though the original taking be tortious; nor can he bring an action, if the pound be broken, and the goods rescued, but it should be brought by the party interested.

By statute, the goods distrained for rent, of whatever kind, may be impounded, or otherwise secured, on any part of the premises, where the distress is taken, which shall answer the same purpose as a public pound; (c) but we have seen that the taker may not work the distress, or otherwise use it, under any circumstances, whether it be secured in pound *covert* or *overt*, except it be to milk cows that are distrained; and he cannot even tie, or bind a beast in the pound, though it be to prevent an escape; but, if the beast die without the distrainer's fault, he may distrain again, or have an action for the rent.

We have seen, that in all these cases of distress for rent, if the original taking was lawful, the abuse or neglect of the distress, shall not make the distrainer a trespasser *from the beginning*; but the party still may have an action of *trespass*, for the abuse or *misfeasance*, or *on the case*, for neglect or *nonfeasance*. (Ante, 201.)

If the distress be unfounded, even though it be impounded, if the pound be unlocked, it is said that the owner may rescue the chattels distrained; but when the goods are once impounded and secured, whether the distress were unfounded or not, the breaking the pound, and taking out the goods, is a high offence, for which an indictment lies, and, if the distress be well founded, an action of trespass at the suit of the party grieved; and so, if one breaks the pound, or the lock of it, or any part of it; and the party may, moreover, take the goods again wherever he finds them, and again impound them. And the statute declares, (d) that the party grieved, by pound breach or rescous, may moreover, in an action of trespass, or on the case, recover of the offender (or owner, if the goods come to his hands) treble his damages therefor; the construction upon which statute authorizes a recovery also, in the same action, of treble costs.—

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(c) id. 436, s. 7.

(d) 1 N. R. L. 436, s. 8.

And this rescous need not be with force, for, even where the distress, on its way to the pound, got into the house of the owner, who did not deliver it, on demand, this was holden a rescous.

The mode in which this distress is to be disposed of, is pointed out by the statute,<sup>(1)</sup> the forms of proceeding under which, are to be found in several books of general use, and I shall not repeat them here.

A notice for a sale, under this statute, need not specify the time, when the rent became due; but it is illegal to swear the person distraining, as one of the appraisers. We have seen that the goods should be removed from the premises, at the expiration of five days after the distress. Such five days are inclusive of the day of sale, and hence Mr. Woodfall thinks that they may remain on the premises six days; a distress made on the 12th of May, for instance, and notice thereof given the same day; the five days expire on the evening of the 17th, though it was holden, that a sale on the afternoon of the 17th was regular.— Notice of the distress to the owner of the goods distrained, or to the tenant, *personally*, is sufficient, as against them respectively, to warrant a sale, and is even preferable to a notice left at the *chief mansion house*, &c. in the words of the statute.

Under the statute (1 N. R. L. 436, s. 11) authorizing a defendant, in any action to be brought, for any entry or distress, &c. to plead the general issue, and give the special matter in evidence, a landlord cannot justify, except for acts done as landlord: for the act does not extend to any excess or abuse of his authority, as the expulsion of the tenant. And so if the goods remain on the premises beyond the five days, he cannot under this statute show a right by license, from the tenant, to take them away afterwards, but must plead such license specially, as if the statute had not been passed. In a word, the act to be brought within this statute, must be done *by virtue* of the defendant's authority as landlord, bailiff, &c. and not merely *by colour* of his authority. (Vide 15 John. 267.)

But, since the statute (1 N. R. L. 436, s. 10.) an action of trover will not lie, for selling the goods before the five days from the distress has expired, nor will trespass for taking and carrying away the goods, lie; but for this, as for all other irregularities, in disposing of a distress for rent lawfully taken,

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(1) 1 N. R. L. 434, 5, &c.



the action should be trespass or case for the special damages, as we before noticed, stating specially the injury done.(e)

A landlord may distrain for rent payable in *services*, as well as where it is payable in money; but the amount or value of the services must be certain, or capable of being reduced to a certainty; and this must appear from the lease itself. Thus, it was held that a landlord might distrain for seventy dollars rent, payable in repairs, and so for any other services, certain in amount, as the service of shearing sheep by way of rent.(f) And to shear all the sheep depasturing in the landlord's manor, by way of rent, without putting it at a certain value in money, in the lease, is sufficiently certain, albeit the landlord hath some times a greater number, and some times a lesser number there; for this is capable of being reduced to a certainty, by referring to the number of sheep, and then inquiring into the price or worth of shearing them, and so of the like cases.(g)

And, although the landlord first bring an action of debt, or covenant, for the rent, and obtain judgment therefor, yet he may afterwards distrain, for the same identical rent, unless his judgment be satisfied.(h)

It may be proper to notice here, that by a late decision, the tenant may replevy the distress, after the five days, allowed by the statute, have expired, if it be done before the sale. (5 Taunt. Rep. 451.)

## 2. WHAT THINGS ARE DISTRAINABLE.

The general rule of law is, that *all things upon the premises are liable to the landlord's distress for rent*, whether they be the effects of a tenant, or a stranger;(i) and, accordingly, where one *Johnson* distrained a horse belonging to one *Holt*, which horse, *Holt* had suffered to remain upon certain premises, which *Johnson* had demised to one *Soule*, who owed him rent therefor. After distraining, *Soule* agreed that *Johnson*, instead of taking the horse to an open pound, should take him home, and use him, which he did, and while so using him, *Holt* came and took the horse out of his possession. Although *Holt* was clearly the own-

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(e) For most of the above remarks, made in relation to a distress for rent, from the last note (u), to the present note (e), the reader is referred to Woodf. L. & T. 2d London ed. 391 to 401, & the authorities there cited from which ed. all my quotations from *Woodf.* are made, throughout this treatise.

(f) 10 John. 91. 2.  
(g) Vid. Co. Litt. 96. a.

(h) 13 John. 240.  
(i) Woodf. L. & T. 385.

er of the horse, yet he was holden a trespasser, and accountable to *Johnson* for the value of the horse, which he had regularly distrained : and, although the working the horse was an abuse of his authority, yet since the statute (1 N. R. L. 436) he was protected from being considered a trespasser from the beginning. His right therefore to the horse, as a distress, continued perfect, notwithstanding such irregularity ; and, in an action of trespass by *Johnson* against *Holt*, the judgment of the justice, being in favour of *Holt*, was reversed on *certiorari*.(j)

From the above general rule, however, certain things are excepted, and cannot be distrained for rent. 1. *At common law* : Those things, in which a man cannot have a valuable property are not distrainable, as dogs, cats, rabbits, and all animals naturally wild. But deer in a park, enclosed there, for the purpose of sale or profit, are an exception, and may be distrained.(k) And whatever is in a man's personal use or occupation, or, indeed, that of his servant, is also privileged for the time ; as an axe, with which a man is cutting wood, or a horse, while he is riding him, or a loom in the use of his apprentice and the like.(l) But horses, while drawing a cart, may, cart and all, be distrained for rent arrear.(m) But wearing apparel, while in use, cannot be distrained, though it may be so, if not in use.(n)

Valuable things, in the way of trade, are also exempt ; as a horse standing at a smith's shop, or cloth at a tailor's, or corn sent to a mill, or a market, yarn at a weaver's, on its way to the weaver's, or carried to a private house to be weighed, on its way from the weaver's, and hung there till weighed ; a horse which thus carries the yarn, or fetches it from the weaver's ; a horse that brings corn to market, and is put into the yard, while the corn is selling ; goods in the possession of a common carrier, though not on their way, but delivered to him, to put into a waggon, in a private barn ; the goods of a guest at an inn, or his cattle or sheep, &c. at the inn-stable or pasture, though this is confined to temporary guests, and does not extend to a permanent lodger ;(o) and so of the like cases. But a gentleman's chariot standing in the coach house of a livery stable keeper, is liable to distress.(p)

Again. Whatever is a part of the freehold, is exempt from distress, that is to say, such things as the tenant will not be permitted to remove with him, from the premises, which will be

(j) 14 John. 425.

(k) Woodf. L. & T. 391.

(l) id. 384, 5. 3 Bl. Com. 2.

(m) 3 Bl. Com. 2.

(n) Woodf. L. & T. 386. 1 Esp.

Rep. 206.

(o) 3 Bl. Com. 2. Woodf. L. & T.

385 to 388.

(p) Woodf. L. T. 386. 3 Burr.

1498.

noticed when we come to speak of what things may be taken in execution, towards the close of the volume ; merely remarking here, that a smith's anvil has been held not distrainable, for it is accounted part of the forge, though it be not fixed by nails to the shop ; and so of a mill stone, though it be removed out of its proper place to be picked.(q) But crops growing, of whatever kind, may be distrained by statute, and, when ripe, may be cut and carried away.(1 N. R. L. 435.)

Again. *Goods in the custody of the law*, are not distrainable for rent, as goods distrained *damage feasant*, or taken on execution, or attachment.(r) And, indeed, it is laid down by Mr. Woodfall,(s) that when crops, &c. are seized on execution, and sold, but suffered to remain on the premises, not being capable of removal, yet they are still so far to be considered in the custody of the law, as not to be distrainable ; and this notion is countenanced by an authority in Willes' Rep.(t) But the contrary has been explicitly holden, in a late case, in the English Court of Exchequer, *Gwillim v. Barker*,(u) by which such a strange and unaccountable anomaly in the law of distresses, seems to be corrected.

Again. *Any thing which cannot be returned in as good plight as when taken*, is not the subject of distress, as milk, fruit, and the like,(v) and such was anciently the law with regard to sheaves, or shocks of corn, &c. as they were liable to damage in their removal, though it was otherwise with regard to a cart loaded with corn, for that could be safely restored. And now, by statute, corn or hay, in any situation, upon the demised premises, may be distrained.(w)

*A distinction obtains, with regard to the right of distraining the beasts of a stranger, which come upon the demised premises.*—Where they are placed in this situation, by the owner's consent, even though the landlord know of it, and have agreed with the owner, that he might put them there, yet the landlord may distrain them unless he also expressly agreed not to do so. If they be there, by the owner's consent, without such agreement of the landlord, or, if they are trespassers upon the land, having broken in, they are equally distrainable immediately ; but if they have broken through a fence, for want of its being in repair, which fence it was the duty of the tenant to keep in repair against them, they are not then subject to distress, till they have been *levant and couchant*, on the land, that is, have been there long enough to have lain down and risen up to feed ; which, in

(q) Woodf. L. & T. 389.

(r) id.

(s) id. 390.

(t) Willes, 131.

(u) 1 Price's Exch. Rep. 274.

(v) 3 Bl. Com. 10.

(w) 1 N. R. L. 435, s. 6.

general, is held to be one night, at least : and not only this, but the owner must have notice, that his beasts are there, in this latter case, where they came on, through the tenant's neglect of duty, in not repairing the fence, which he was bound to repair against them. And then, after they have been *levant et couchant*, and notice has been given to the owner that they are there, if he neglects to take them away, they are then distrainable, as in the two former instances.(x)

2. *Certain things are exempt from distress for rent, by statute.* Beasts of the plough, and sheep, and the tools and implements of a man's trade, were considered at one time *absolutely* privileged at the common law ;(y) but a statute was passed, which is generally considered in affirmance of the common law, giving them only a qualified exemption ;(z) and they are now distrainable, if there is not other property sufficient upon the premises.(a) But still, the law favors their exemption so far, that, in an action for wrongfully distraining them, it will intend that a sufficient distress was to be found upon the premises, consisting of other articles, till the contrary is made to appear by the distrainer. These chattels may therefore, still be called, *prima facie*, not distrainable.(b) Thus, beasts of the plough, sheep, the axe, of a carpenter, the books of a scholar, and the like, are not distrainable, till search has been made in vain, for other property, the legal subject of distress.

Again. All sheep to the number of ten, with their fleeces, and cloth manufactured from them ; one cow ; two swine, and the pork made from them ; all necessary wearing apparel and bedding ; necessary cooking utensils, one table, six chairs, six knives and forks, six plates, and six tea cups and saucers, owned by any person being a house holder, are exempt from distress for rent.(c) And so of the arms, ammunition and accoutrements of a common militia man.(d)

In an action of trespass, against the distrainer, for taking and carrying away goods, if the plaintiff mean to recover, on the ground, that necessary cooking utensils, &c. have been distrained, it is enough for the defendant to show a right to distrain, and it then lies with the plaintiff, to show, affirmatively ; that they were necessary. It is not enough that they are shown by the plaintiff, to be *cooking utensils*, &c. but he must

(x) 3 Bl. Com. 6, 9. Woodf. L. & T. 387.

(y) 3 Bl. Com. 9.

(z) Woodf. L. & T. 385.

(a) 1 N. R. L. 434, s. 3.

(b) Woodf. L. & T. 384. id. 313.

(c) Laws, sess. 38, ch. 227.

(d) Laws, sess. 41, ch. 222, s. 1.



moreover, show, that they are *necessary*, &c. or he cannot recover.(e)

### THE SUBJECT OF DISTRESSES, DAMAGE FEASANT, CONCLUDED.

3. The above qualifications and exceptions, as to the time, reasonableness, and kind of distress, have no application to distresses, damage feasant, and an abuse, or irregularity, in the disposition of the latter kind of distress, will make the party a trespasser from the beginning, as at common law. No beasts of any kind, distrained, are to be driven out of the town, manor district or precinct, where taken, except it be to a pound overt, within the same county, not above three miles distant from the place where the distress is taken ; and no beasts, or goods, or chattels, distrained or taken by way of distress for any cause whatsoever, at one time, shall be impounded in several places, upon pain, that every person offending therein, shall, for every such offence, forfeit to the party grieved, ten pounds, and treble damages.(f) This statute applies both to distresses for rent and damage feasant, and we have, accordingly, noticed it under both heads, and before mentioned a case upon its construction.(g)

The most punctilious regularity, is necessary in making a distress, damage feasant ; and the least deviation from legal rules, in taking, and disposing of the distress, will subject the party to a replevin, or an action of trespass, or trover, for the value of the article distrained ; for whatever makes a man a trespasser from the beginning, strips him of all right to protection, in any thing, which he has done, and constitutes him a mere wrong doer, throughout. Besides the English cases, there have been several decisions in this state,(h) establishing this doctrine, some of which I shall notice, after adverting more particularly, than I have yet done to the statute regulating the disposition of this mode of distress.

This statute provides, that when any distress shall be made, of any beasts, doing damage, the person distraining shall, as soon as conveniently may be, and within twenty four hours thereafter, unless the distress be made on Saturday, in which case he shall, before Tuesday morning thereafter, make application to the two nearest fence viewers, in the same town, to appraise

(e) 14 John. 434.

(f) 1 N. R. L. 93, s. 3.

(g) Ante, 231, 2.

(h) 2 John. 191. 10 John. 253. id.

and ascertain the damage, who shall, immediately thereupon, go to the place where such damage shall be committed, and view the damage done, and appraise, ascertain, and certify under their hands, the amount thereof, with their fees for the same ; and if any dispute shall arise concerning the sufficiency of the fence, it shall be determined by the same fence viewers, whose decision shall be conclusive, and the person making the distress shall, as soon as he shall think proper, and within forty eight hours, after making such distress, unless the damage shall be sooner paid, cause the beasts so distrained, to be put in the nearest pound, in the same county, where they shall remain, until the sum so certified, by the fence viewers, with the fees of the pound master, shall be paid, or the beasts so impounded, be replevied.(i)

Under this statute, the distress may be rescued, at any time before it is put in a publick pound, if it was taken without cause, but after it is put in a publick pound, it cannot be rescued, whether there be cause for the distress or not.(j) Until the requisite ceremonies are gone through with, preparatory to placing it in a publick pound, the distrainer may impound the beasts in a special pound, *overt* or *covert*.(k)

The sense of the legislature, as clearly expressed in this statute is, that the damages must be ascertained by the fence viewers before the beasts are put into publick pound ; when they are thus impounded, they are in the custody of the law : they are, in fact, in execution by summary process, afforded by the law for injuries done on a man's land ; and when impounded in a publick pound, the party has no mode of regaining possession, but by paying the damages and fees to the pound keeper, or by replevying them.(l)

If any dispute arises, upon the sufficiency of the fence, the fence viewers, who appraise the damages, are to determine thereon, and their decision is to be conclusive ; and, under this clause of the act, a case may happen in which, though damage has been done, it may arise from defect of fences of the party distraining, in which case no damages would be appraised.(m)

In these cases, if the distress be put in a publick pound before damages are appraised, it is such an act of irregularity as

(i) 1 N. R. L. 134, s. 19.

(j) 10 John. 258, per Spencer,  
J. 3 Bl. Com. 12.

(k) 10 John. 258, per Spencer,  
Justice.

(l) id.

(m) id.

renders the whole proceeding void, and the distrainer a trespasser from the beginning.<sup>(n)</sup> And so, without doubt, would be the decision of the law, with regard to any positive disposition of the distress, without having every previous preparatory step perfectly regular; as if the distress should be sold, under the 21st section,<sup>(o)</sup> without advertising, as required by the act, or before the six days allowed by the act had expired, and so of the like cases.

But here, we ought to note again, the distinction, between a mere *nonfeasance*, and some act of *misfeasance*, done irregularly. The former will, in no case, render the party a trespasser *from the beginning*: and this doctrine is not confined to distresses, but runs through every case, where a license, entry or authority is given by the law. Hence, an act of mere neglect; for instance, neglecting to deliver a distress on tender of amends; <sup>(p)</sup> a neglect to pay for the wine, which one calls for at a tavern; <sup>(q)</sup> of an officer, to deliver goods taken in execution, after the debt is paid.<sup>(r)</sup> will not make the party a trespasser from the beginning, if not followed by some unwarrantable or irregular act about the property, as cutting nets, distrained damage feasant, (Cro. Car. 228) working a horse distrained, (Cro. Jac. 147. 1 T. R. 12) or otherwise using it, or some other positive interference with it.<sup>(s)</sup> But still, the party injured, may have his appropriate remedy, an action on the case, for these *negative wrongs of nonfeasance*.

And here we shall part with the subject of distresses, a topic on which I did not intend to have said so much; but its great prevalence in common life, as a means of prompt redress for those trifling, yet often repeated injuries, which will hardly brook "the law's delay," consistently with other concerns, seems to have forbidden my saying less. The statute book, with the above remarks and references, it is hoped will render this remedy more safe and certain, than it has hitherto been.— One point we have certainly gained by this diffuseness. The illustration it affords, of the rule which makes certain acts authorized by law, trespasses *from the beginning*, applies so fully to all other cases, which range themselves under it, as to save much time, which it would be otherwise necessary to devote to

<sup>(n)</sup> 2 John. 191. 10 John. 259. id. 369.

<sup>(o)</sup> 1 N. R. L. 134.

<sup>(p)</sup> 8 Co. 146. Edinburgh ed. 290.  
10 John. 373, per Kent, Ch. J. 15  
John. 402, per Spencer, J.

<sup>(q)</sup> 8 Co. 290. 10 John. 258, per  
Spencer, J. 15 John. 402, per  
Spencer, J.

<sup>(r)</sup> 15 John. 401.

<sup>(s)</sup> Vid. 8 Co. 290. 11 East, 395.  
id. 405, note. Cro. Jac. 147.

their consideration. Thus, where officers are authorized by law, to do certain things, about the execution of process or otherwise, and they commit an abuse, or an irregular exercise of such power ; or the party sustains an injury by their neglect, the mode of redress, whether in trespass, trover or case, would readily occur, on comparing such acts, with those of similar character, in a case of distress damage feasant, and noticing the remedy for them under that head ; and so of all their acts, which are illegal and unauthorized, in the first instance. The general duty of those officers, in the execution of civil process, will be noticed, when I come to speak of the service of process, under the proper heads. The rights and duties of a sheriff, in taking and disposing of goods, under a *fieri facias*, are in almost every respect, similar to those of a constable, under an execution ; for which reason I shall not in any part of this treatise point out the former, with any degree of particularity ; but shall content myself with noticing the latter, in the due order of time, without a further application of them, to the sheriff and his *fieri facias*. (Vid. Ante, 221 to 225, my remarks as to priority, arising from a levy under executions, &c.)

OF THE POSSESSION, NECESSARY TO MAINTAIN TRESPASS, FOR AN INJURY TO PERSONAL PROPERTY.

Trespass is a possessory action : and the plaintiff must, at the time when the injury was committed, have had an *actual* or *constructive* possession. (g) as well as a *general, special* or *qualified* property, in the chattel injured.

*General*, means the same as *absolute* property, which we have already defined, (h) and the person, who has such a property in goods or chattels, may support this action, although he has never had the *actual* possession, or has parted with his possession to a carrier, servant, &c. not coupled with an interest in the thing ; (i) it being a rule of law, that a *general* property in personal chattels, *prima facie*, draws to it the possession ; (k) and this rule holds by relation ; as in case of executors and administrators, &c. who may support trespass for an injury to personal property, committed after the death of the testator or intestate, and before probate or administration. (l) So may a legatee, after an executor has assented to the legacy, for a trespass committed before such assent. (m) But, if the

(g) 1 T. R. 480. id. 490. 7 T. R. 9. 8 John. 432.

(h) Ante, 157, & vid. 1 Chitty pl. 187.

(i) 7 T. R. 12.

(k) 2 Saund. 47. a. b. d. 2 Bulst. 268. 7 T. R. 9. 1 T. R. 480.

(l) id. ibid. 1 T. R. 480. Bac. Abr. executors, (H) 1. 2 Saund. 47. k.

(m) Bro. Abr. Trespass, pl. 25.



general owner part with his possession, and the bailee have a right to use the thing; the inference of possession is rebutted, and the right of possession, being in reversion, the general owner cannot support trespass, but only an action on the case, for an injury done by a stranger, while the bailee's right continued.<sup>(n)</sup> Nor can the general owner support this action, even against the bailee for a mere abuse, though, if a bailee *destroy* the thing, trespass may be supported, if the injury were forcible.<sup>(o)</sup>

Mr. Chitty hints, that in the case of a factor or consignee of goods, he may, on account of his interest in the commission, &c. maintain this action, like a general owner, without actual possession; but in all other cases of bailees, actual possession is necessary; for, indeed, delivery *in fact*, is essential to the bailment; and where a mere finder, or wrongful possessor, bring this action, actual possession is of course necessary.<sup>(p)</sup> In this last case, we have already noticed, that the defendant cannot set up in his defence, as he may do in trover, a paramount title in a third person.<sup>(q)</sup>

FARTHER REMARKS, WITH REGARD TO THE NATURE OF THE INJURY TO PERSONAL PROPERTY, FOR WHICH THIS ACTION LIES.

*This is first, an illegal taking, or, which is the same thing, an abuse which renders a legal taking unlawful, from the beginning. We had nearly closed this part of our subject, in speaking of distresses, and the few remarks immediately preceding that subject, but we shall pursue it here.*

*Secondly, other injuries to personal property, though the wrong doer does not take away, or dispose of the same, which we have also partially noticed, in speaking of injuries to distresses for rent, where the original taking was lawful.*

1. This action lies, though there be no wrongful intent,<sup>(h)</sup> as if a sheriff or constable, by mistake, take the goods of a wrong person in execution,<sup>(i)</sup> or take goods in execution, after the return day is past; and if this be done by the direction of the plaintiff and his attorney, they are all trespassers.<sup>(j)</sup> But if a sheriff or constable, or a stranger illegally take the goods of another in execution, and sell and deliver them to a third person,

<sup>(n)</sup> 4 T. R. 489. 7 T. R. 9. 3 Lev. 209. 8 John. 432.

<sup>(o)</sup> 1 Chitty on pl. 167.

<sup>(p)</sup> Vid. id. 168, & cases there

cited.

<sup>(q)</sup> Ante, 227, 8. 13 John 141. id. 151, per Spencer, J. 13 John. 276.

<sup>(h)</sup> Vid. 1 Chitty on pl. 129. 3 Lev. 37.

<sup>(i)</sup> id. 130.

<sup>(j)</sup> 4 John. 469.

*trespass* cannot be supported against the latter, because they came to him without fault on his part ;(k) though, if a second trespasser take goods out of the custody of the first trespasser, the owner may support trespass against the second taker, his act not being excusable.(l) This action may be supported against a bailee, having only a bare authority, as if a servant take goods out of his master's shop, and convert them ;(m) but not against a bailee coupled with an interest, unless he destroy the chattel ;(n) nor against a joint tenant, or tenant in common, for merely taking away and holding exclusively, the possession from his co-tenant ;(o) because each has an interest in the whole, and a right to dispose thereof ;(p) but, if the thing be destroyed, trespass lies.(q) and case may be supported, for injuring the thing.(r) A bailee of a chattel, for a certain time, coupled with an interest, may support this action against the bailor, for taking it away before the time.(s) And it lies, though after the illegal taking the goods be restored ;(t) for such return only goes in mitigation of damages : but where there is a return of the goods, whether before or after action brought, or before or after issue joined, this is proper evidence in mitigation of damages, and the court is bound to receive it, without its being pleaded. And it is immaterial, from whom the plaintiff may have received the property, whether from the defendant, or any other person.(u) When the taking is unlawful, either the general owner, or bailee, may maintain trespass, but a recovery by one is a bar to the action by the other ;(v) and it will not lie for a refusal to deliver, when the first taking was lawful, trover or detinue being in such case the only remedies.(w) — Thus, after a delivery of goods sold, the seller cannot, on account of fraud in the contract, forbid the goods to be taken away, and bring an action of trespass against a person taking them away. (12 John. 348.)

A constable, or sheriff, who has seized goods on execution, may maintain trespass, as well as trover, against one who takes them away ;(x) and proof of the execution and levy, is enough to sustain the action, without proving the judgment upon which the execution issued ;(y) but, a purchaser under an execution,

(k) 2 Roll. Ab. 556, pl. 50. Bro. Abr. Trespass, pl. 49. 6 John. 44.

(l) Sid. 138.

(m) 1 Leon. 87. Cro. Eliz. 781. 3 Co. 13. b.

(n) Vid. 1 Chitty on pl. 154.

(o) 1 T. R. 659. Cowp. 430. 2 Saund. 47. g. 2 John. 468.

(p) 1 Lev. 29. 8 T. R. 145. Co. Litt. 200. a. Cowp. 217. 4 East. 121.

(q) Co. Litt. 200. a. 2 John. 468.

(r) 8 T. R. 145. 1 Ld. Raym. 737.

(s) Godb. 173. F. N. B. 86. n. a.

(t) Vid. 1 Chitty on pl. 155. Bro. Abr. Trespass, pl. 221. 2 Roll. Abr. 569, pl. 3. 6. 11 John. 175.

(u) 11 John. 175.

(v) 2 Saund. 47. v. Bro. Trespass, 67. 2 Roll. Abr. 569. P. 1 Chitty on pl. 152.

(w) Sir T. Raym. 472. 2 Vent. 170. 2 Saund. 47. k.

(x) 6 John. 195. 7 id. 32.

(y) 6 John. 195. 7 id. 32.

who never had possession of the property purchased, cannot maintain an action, even against a stranger, who takes it away, without proving the judgment, as well as the execution and sale ; (2) though a *bona fide* purchaser, under an execution, shall not lose his property, even if the judgment be reversed on error. (a) So in an action brought by the defendant against a constable, &c. for taking his goods in execution, it is sufficient, in his defence, to produce and prove the execution without showing the judgment. (b)

Under the common school act (1 N. R. L. 261, s. 8) it is lawful, when a district have voted a tax, that the same should be assessed by the trustees, according to the tax list of the year ending on the first of August, next preceding the vote ; for the town assessment roll is by (2 N. R. L. 510) to be completed by the first day of August, in each year. A seizure of goods, therefore, under a warrant made out upon these principles, will not subject the trustees of the district to an action of trespass. (c) Nor will this action lie against the collector of a school district, for taking property under his warrant, because he did not swear into office in 15 days after his election ; for it is enough, if he swear into office before he does any act as collector ; nor is it any objection that he is district clerk at the same time, for the offices are not incompatible. (16 John. 135.) (6)

A wilful trespasser cannot acquire title to property, merely by changing it from one species into another ; as if a man cut timber on my land, and convert it into shingles, they belong to me, even though I sue him, and he pay me the value of the timber to settle the suit, unless I agree that he should have the shingles ; and so of the like cases. (5 John. 348. 6 John. 168.) But, if a trespasser take possession of my chattel, and I sue him, and recover damages for the chattel, and have execution done on such recovery, the property passes to the defendant by operation of law ; (6 John. 168) but such recovery, in order to

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(6) It has lately been decided, that district school meetings must specify the precise sum to be raised ; and that if they authorize the trustees to raise a sum at their discretion, for a certain purpose (as to build a school-house,) the trustees have no right to act under such a vote, and the execution of their warrant would make them trespassers. 18th John. 351. But where trustees have expended monies without a legal and regular authority, it is competent for the taxable inhabitants of the district, to meet and vote a tax to re-imburse them, or to audit and sanction a tax list already made, which happens to be irregular. id. 352, per Platt, J.

(2) 7 John. 535. 12 John. 213. id. 215, per Thompson, ch. J.

(a) id. & vid. 3 Co. 96. b. Edinburgh ed. 191.

(b) 12 John. 395.

(c) id. 412, & vid. Laws, sess. 42, ch. 161, s. 25.

pass the property, must be for the chattel itself, and not for the materials out of which it was made, merely. (id.)

2. So trespass lies, for any immediate injury to personal property, occasioned by actual or implied force, though the wrong doer do not take away or dispose of the chattel; as for shooting or beating a dog or other live animal, or for hunting or chasing sheep, &c. (d) But if I find a dog killing or even chasing my sheep, fowl or other useful or reclaimed animal, and it is necessary, in order to preserve such animal, I may kill him; and so, even though the animal he is pursuing do not belong to me; and the justice or jury are to decide, as a question of fact, whether the killing was from necessity or not. (e) So trespass will not lie for killing a ferocious dog, which has done mischief by killing sheep, or otherwise, if the owner, knowing, or having notice of his ferocious disposition, still suffer him to run at large. (f) So, if he has been bitten by a mad dog. (g)

This action lies for mixing water with another's wine, and the like. (h) But it is said, that for the mere battery of a horse, not accompanied with special damage, no action can be sustained. (i)

It is said, that if a bailee of a beast, &c. kill it, trespass cannot be supported, but only case, because a general confidence had been reposed in him; (j) but this appears to be erroneous; for, though the act may not render the party a trespasser *from the beginning*, yet he may be considered a trespasser for the wrongful act itself. (k) So case. (l) or assumpsit, for a breach of the implied contract may be supported; (m) and it seems clear, that if a person be bailee, though coupled with a beneficial interest, as of sheep to feed his land, or of oxen to plough it, (n) and he kill or destroy them, trespass lies, because his interest therein is thereby determined, the same as when a tenant at will cuts down trees; (o) so one joint tenant, or tenant in common, may support trespass against his co-tenant, when the chattel is *destroyed*, and even consider the defendant as guilty of entering the dove-cote, the fishery, &c. and taking away the

(d) Barnes, 452. 3 T. R. 37. Hob. 283. 3 Bl. Com. 153.

(e) 9 John. 233.

(f) 13 Id. 312.

(g) *id.*

(h) F. N. B. 88.

(i) 2 Stra. 872. Quere, Barnes, 452.

(j) Bac. Abr. Trespass (G) I. Moore, 248.

(k) Co. Litt. 57. a. Cro. Eliz. 777, 784. 5 Co. 13. b. Bro. Trespass, pl. 295. 1 Leon. 87. 11 Co. 82. a.

(l) Co. Litt. 5. a. n. 4.

(m) Cro. Eliz. 777, 784.

(n) Co. Litt. 37. a. Cro. Eliz. 784.

(o) 7 T. R. 11 Co. Litt. 57. a. Cro. Eliz. 784. 5 Co. 13. b. 11 Co. 82. a. Byer, 121. b. pl. 17. Ante, 203.



thing ;(p) but if the thing be not destroyed, trespass does not lie against a bailee coupled with an interest, for abusing the chattel ;(q) because an interest and the right of possession still continue in the bailee, and a general owner has no immediate right of possession, at the time the injury was committed ; and trespass cannot be supported, even against a stranger, unless there be an immediate right of possession (r) Trespass will not lie for a loss or injury, occasioned by a bailee's negligence, because it does not lie for a *non-feasance*.(s)

#### WRONGS ARE JOINT AND SEVERAL.

Where there are several persons, jointly guilty of a trespass or other mere wrong, they may be sued *jointly* or *severally*, and each one may be proceeded against to judgment, for the whole damages, and the costs of each suit collected ; but only *one damage*,(t) as we noticed in the case of *joint* and *several* contracts. (Ante, 129 to 132.) And the same precautions there mentioned in regard to settling with, or releasing one of the defendants, without including the costs of the other suits, are necessary here.(u)

(p) Co. Litt. 200. a. b. 2 Saund. 47. b. g. 8 T. R. 146.

(q) 2 Saund. 47. g.

(r) 7 T. R. 9. 4 T. R. 489. 8 John. 432.

(s) 5 Co. 13, b. 14. a. & vid. 1 Chitty on pl. 124.

(t) 1 John. 290.

(u) Hob. 70.

## CHAPTER III. OF THE ORIGINAL PROCESS.

THIS IS BY SUMMONS, WARRANT, OR ATTACHMENT.

### SECTION I.

#### OF PROCESS BY SUMMONS:

THIS is the only process which can issue *of course*, against a freeholder, or inhabitant *having a family*, who resides in the county where it issues. Against a single man, *not a freeholder*, the plaintiff may, if the defendant resides in the county, elect to proceed, either by a summons or warrant. (v) The form of the summons may be as follows :

#### FORM OF A SUMMONS.

SARATOGA COUNTY, ss. (8)

PHILIP GREEN, *Esq.* one of the justices of the peace of the said county : To any constable of the said county, Greeting :— In the name of the people of the state of New-York, you are hereby commanded to summon RICHARD ROE to appear before me, the said justice, at my office, in the town of *Saratoga Springs*,

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(8) That is, *Saratoga County, to wit.* These words are generally useful, though not essential, in any legal instrument, used in the commencement or progress of a cause ; and therefore, for more abundant caution, should always be inserted. They, generally, denote the place where the instrument is made, as well as the local jurisdiction within which process may be executed ; and will aid any subsequent omission of the name of the county, in the same instrument, in the description of place. Thus, in the above summons, should *Green* style himself *one of the justice of the peace* : should he direct the process to *any constable* ;—make his process returnable *in the town of Saratoga Springs* ;—or state the process to be *given under his hand and seal, at the town of Saratoga Springs* ;—and in each of these cases omit to add “ *the county of Saratoga,*” or “ *the said county,*” the

(v) 1 N. R. L. 387, 8. s. 2.

in the said county, on the 12th day of September instant, at one o'clock in the afternoon of that day, to answer unto JAMES JACKSON, in a plea of trespass on the case, to his damage of twenty-five dollars. And have then there this precept. Hereof fail not, at your peril. Given under my hand, at the said town of Saratoga Springs, the first day of September. A. D. 1819.

PHILIP GREEN.

If the plaintiff sues, or the defendant is sued, in a particular character, it should be so expressed in the process, whether by summons, warrant, or attachment. Thus, in favour of *executors*, say,

To answer unto A and B, executors of the last will and testament of C, deceased ;

*Of a surviving executor,*

To answer unto A, surviving executor of the last will and testament of C, deceased ;

*Of administrators,*

To answer unto A and B, administrators of all and singular the goods and chattels, rights and credits, which were of C, deceased ;

*Of a surviving partner, or other surviving joint creditor,*

To answer unto A, survivor of A and B ;

*Of husband and wife,*

To answer unto A and M, his wife ;

*Of the assignees of an insolvent debtor,*

To answer unto A and B, assignees of C, an insolvent debtor ;

*Of the assignee of a gaol bond,*

To answer unto A, assignee of B, Esq. sheriff of the county of Saratoga ;

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county named in the margin, would supply the omission ; and the law will aid the defect by intending, that all these descriptions and acts, are of, or within the county mentioned in the margin : and so of the like cases. 'Vid. 1 Chitty on pl. 279, 80, & the cases there cited.

*Of overseers of the poor,*

To answer unto A and B, overseers of the poor of the town of Saratoga Springs, in the said county ;

*In a qui tam action,*

To answer unto A, who sues as well for himself, as for the overseers of the poor of the town of Saratoga Springs, in the said county ;

*In favour of a supervisor,*

To answer unto A, supervisor of the town of Saratoga Springs, in the said county ;

*In favour of a sheriff,*

To answer unto A, Esq. sheriff of the county of Saratoga ;

*In favour of a corporation,*

To answer unto (here insert the precise name given them by the statute of incorporation.)

*And so of the like cases.*

The above will be a sufficient guide in describing defendants, by a particular character, where this is necessary. You only have to say "To SUMMON A," &c. instead of "To ANSWER A," &c.

The instances in which this description of a defendant becomes necessary, are comparatively rare in a justice's court ; and confined to cases where the defendant is liable in his own right, and not where he is sued in his representative character, as executor, or administrator ; or the assignees of an insolvent debtor, for in these cases, we have seen a justice has not jurisdiction.<sup>(w)</sup> The same remark will apply to a proceeding against a corporation ;<sup>(x)</sup> and probably to divers instances of proceedings against overseers of the poor, commissioners of highways, and other officers, where they are sued in their official character, which may then be considered either *representative* or *corporate*, and, therefore, as excluding a justice's jurisdiction.<sup>(y)</sup>

<sup>(w)</sup> Ante, 12, & vid. 1 Sell. Pract.  
46. 1 Dunlap's N. Y. Pract. 108.

<sup>(x)</sup> id.

<sup>(y)</sup> id. & vid. 18 John. 122. id.  
382. id. 418, per Spencer, Ch. J.



If the process should happen not to specify the character, or right, in which the plaintiff sues, he may, notwithstanding, declare *qui tam*, or as executor, administrator, or assignee, or in any other special character; for this does not tend to enlarge, but to narrow the demand, which the defendant was called upon to answer; but if his special character appear in the process, he must pursue it in declaring, or the defendant may object the variance, by plea in abatement, or motion to set aside the proceedings for irregularity. This distinction seems, in reason, to apply to a warrant or attachment, as well as a summons, for the ground upon which it is confined in the higher courts to process *not bailable*, does not extend to a justice's court. (z)

Partners must sue and be sued by their names at length, and not in the name of their firm. (a)

The summons is, to answer the plaintiff of the plea in the same summons to be mentioned. (b)

DEBT—To answer James Jackson in a plea of debt for \$25.

DETINUE—In a plea of detinue, for one bureau (or other chattel, mentioning it) of the value of \$25.

COVENANT—In a plea of breach of covenant, to his damage of \$25.

ASSUMPSIT,  
TROVER,  
TRESPASS ON THE  
CASE, PROPERLY  
SO CALLED—

} In a plea of trespass on the case, to his damage, &c.

TRESPASS—In a plea of trespass, to his damage, &c.

The form of the process may, in this last respect, be gathered from the preceding heads, in the chapter concerning the nature of actions cognizable before a justice. It is intended as a mere intimation to the defendant, of the charge he is called upon to answer. It is however, mere matter of form, and does not fix the character of the action, and its correctness is useful in no other point of view, than to preserve the harmony and convenience of the subsequent process and proceedings. Thus, though the process be in *debt*, the plaintiff may declare in *trespass*; and even though no plea be mentioned therein, it is presumed that no objection would lie to it on that account.

(z) Vid. Dunlap's N. Y. Prac. 239, 40, & cases there cited.

(a) 3 Caines, 170. 1 Penn. Rep. 75, 137.

(b) 1 N. R. L. 389, s. 2.

Accordingly, in error on *certiorari*: The *summons* mentioned a plea of *trespass*, but the *declaration* was in *trespass on the case*. On the plaintiff's declaring, the defendant objected to the proceedings, on the ground of the variance, but the justice overruled the objection, and gave judgment against the defendant, the proof upon the trial clearly supporting the action declared in. The Supreme Court affirmed the judgment, and assigned their reasons thus: "By the 17th section of the act for the recovery of debts to the value of twenty-five dollars, it is provided that, on *certiorari*, this court shall proceed and give judgment, as the very right of the case may appear, without regarding any imperfection, omission or defect in the proceedings before the court below, in mere matters of form. The variance between the process and declaration was a mere matter of form. The very right of the cause is clearly with the defendant in error, and the judgment must therefore be affirmed." (c)

The defendant must be summoned to answer at a time and place to be expressed in the summons, not less than six, nor more than twelve days, from the time of issuing such summons. (d) As this is in the nature of a notice to the defendant, it is advisable to compute the time one day inclusive, and the other exclusive. Thus, if the summons is returnable on Friday, it should be issued, at least, as early as the Saturday before; and a summons issued the first of September, cannot be made returnable after the thirteenth. (e)

The process is, of course, to be adapted to the 25 or 50 dollar act, according to the amount claimed.

The date of process may always be in figures. (f)

(c) 16 John. 162.

(d) I N. R. I. 388, s. 2.

(e) Vid. ante, 143. Pennington on small causes, 21.

(f) 6 Taunt. Rep. 333.

## SECTION II.

## OF PROCESS BY WARRANT.

The form, as to the *character* and *right* in which the parties *sue* or are *sued*, the *nature* of the action expressed, the *amount* claimed, and *mode* of *doing*, are the same in the case of a warrant as of a summons. For these points, therefore, the reader is referred to the last section.

*First.* A warrant is the only process against a defendant, who *does not reside* in the county where it issues. A summons is forbidden in such case by the express words of the act; <sup>(g)</sup> and that part of the act, authorizing a proceeding by attachment, in certain cases, evidently presupposes his late or present residence to be in the county where it issues, by requiring a copy to be left at the defendant's dwelling house or last place of abode, as a mode of service. <sup>(h)</sup>

Where, however, there are several defendants, part of whom reside within, and a part without the county, there is little doubt, that the plaintiff would be restricted to the more usual proceeding by summons; though he might, undoubtedly, have a warrant or attachment, for cause shown, as in other cases. I make this remark, because I suppose the same rule will govern here, as in other cases of persons privileged to be sued in a particular manner. Where they are sued jointly with others not privileged, the plaintiff may disregard such privilege, and proceed in the ordinary way. Such was once the case of an attorney who, when sued alone, could only be proceeded against by bill of privilege, but when joined with another not privileged, the plaintiff might sue him in the same manner as any other person. <sup>(i)</sup>

This process of *warrant*, also issues of course in two other cases: 1. Against a man *not having a family*, and *not being a freeholder*: and 2. Against a defendant, *who fails to appear on the return of a summons served by copy*, and shows *no good cause for not appearing*. <sup>(j)</sup> In either of these cases, though the defendant reside in the county, the plaintiff may proceed, either by a summons or warrant, without showing any cause for the latter.

<sup>(g)</sup> 1 N. R. L. 388, s. 2.  
<sup>(h)</sup> *id.* 398, s. 24. 15 John. 196.

<sup>(i)</sup> *Vid.* cases, 1 Tidd, 263. n. <sup>(k)</sup>  
<sup>(j)</sup> 1 N. R. L. 387, 8, s. 2.

1. Not having a *family* and not being a *freeholder*. The word *family* has, in the law, no definite signification. The evident policy of the statute was, to exempt from sudden arrest and imprisonment, one upon whom a wife or children are dependent for support. The word *freeholder*, has a more certain import. Any one having an estate in lands, tenements or hereditaments, to him and his heirs, called an estate in fee ;—during his own life, or the life or lives of another or others,—or an estate to him and his heirs, so long as they shall continue to reside in such a place, or until any uncertain event happen,—or an estate to him and some particular heirs, as the heirs of his body, or the heirs *male* or *female* of his body, is a *freeholder*. But where the estate is limited to a certain duration, though it be a thousand years or more, it is not considered, in the law, a *freehold*.<sup>(k)</sup> These estates of freehold may arise, or be created, in a great variety of ways, in the different courses of descent, or modes of purchase, by act and operation of law, or by convention between the parties.<sup>(l)</sup> An estate of freehold may exist, not only in *lands*, the definition of which we have before given ;<sup>(m)</sup> but in a great variety of *ideal* property, called *incorporeal hereditaments*, such as *rents*, *ways*, *commons*, *pensions* and *annuities*, &c. &c.<sup>(n)</sup> To discuss the nature, mode of acquiring and losing, and quantity of these estates, would require a volume of itself ; and the justice, if he have not studied the law, must satisfy himself upon this, and the like collateral heads, which involve so much inquiry, from the best lights he possesses, drawn from his reflection, observation and experience. This may be much aided, by consulting in difficult cases, some candid gentleman in the profession of the law. He will find himself, moreover, greatly assisted, in a variety of points in the line of his duty, which this treatise cannot reach, without transgressing all reasonable bounds, by studying attentively many parts of the commentaries of Blackstone. To a gentleman of intelligence, who holds the commission of a justice, the pages of this elegant epitome of English law, cannot fail to afford both profit and delight.

2. *And shows no good cause for not appearing*. If the defendant shows good cause for not appearing, on the return of a summons, served by copy, it follows that a warrant is not to issue. A second summons should then go ; or the justice might, perhaps, adjourn to a term within six days, and, on the defendant's

(k) Vid. 2 Bl. Comm. 103 to 140.

(l) Vid. id.

(m) Ante, 197.

(n) 2 Bl. Comm. 21.



non-appearance, then issue a second summons.(o) This cause should regularly be shown on oath,(p) to be administered substantially in this form : " You shall true answers make, to such questions as shall be put to you, touching the cause, why the defendant named in this summons, does not appear at the time and place mentioned for the return thereof, so help you God." The sufficiency of this excuse, must be a matter resting in the sound discretion of the justice, from the circumstances of each particular case ; and Mr. Griffith thinks, that under a similar clause in the statute of New-Jersey, it is not illegal for the justice (as is frequently done) to admit the fact alledged for an excuse, upon the representation of the party, by letter, or by a friend.(q)

If no cause be shown, the justice may then, at his option, issue a warrant, or a second summons.(r)

Secondly. If the defendant be a freeholder, or man of a family, the plaintiff may still have his warrant against him, on showing proper cause. In order to this, the plaintiff must prove to the satisfaction of the justice, either 1. that the defendant is about to depart from the county ; or 2. that the plaintiff will be in danger of loosing his or her debt or demand, unless the process against such defendant shall be by warrant ; or 3. that the plaintiff is a non-resident of the county ; and, in this last case, he must also tender to the justice, security for the payment of any sum, which may be adjudged against him.(s)

This proof may be made on the oath of the party applying for the process.(t) But proof of the grounds of the application, either by the oath of the plaintiff, or some other person, is absolutely necessary, and it is not enough that the justice personally knows the plaintiff to be a non-resident, or knows any other sufficient cause for the warrant. He cannot act upon such knowledge, but must dismiss it from his mind, and rely exclusively upon the proof.(u) And the person applying for such warrant shall, by affidavit, or orally on oath, state the facts and circumstances within his knowledge, showing the grounds of his, her or their application, whereby the justice may better judge of the necessity and propriety of issuing such warrant.(v)

(o) 1 N. R. L. 388, s. 2. Griffith's N. J. Treatise, 56.

(p) Vid. Griffith's Treatise, 56.

(q) id. 56.

(r) 1 N. R. L. 388, s. 2. 12 John.

296, 7, per Cur.

(s) 1 N. R. L. 388, 9, s. 4.

(t) id. & vid. 10 John. 114.

(u) 12 John. 422.

(v) 1 N. R. L. 389, s. 4.

It is obviously not a compliance with this statute, for the justice to content himself (as is too often done) with the simple expression of the plaintiff's or other witnesses' *fear or belief* that the defendant is about to depart the county, or that he will be in danger of losing his debt, &c. This is referring the question to the conscience of the plaintiff, or other person sworn, instead of the judgment of the justice. *Facts* should be disclosed on oath, sufficient to enable the justice to draw his own inferences. (w) The fact of the plaintiff's non-residence can generally be ascertained by the direct evidence of the plaintiff himself, or some other person. But, that a man, who is indebted, is about to depart the county, or conceal himself, or make such a disposition of his property, as to embarrass the plaintiff in the collection of his debt, or that he is on the point of insolvency, or other the like facts, authorizing a hasty proceeding by warrant, are, from their very nature, almost in every instance, mere matter of inference from the mysterious conduct of the defendant, or perhaps from a rumour of the neighborhood. Any of the circumstances, which usually precede and indicate the danger of a departure, bankruptcy, or any thing else, rendering the collection of the debt by summons hazardous, I suppose, might be taken into account by the justice, as a part of the proof by which to determine the propriety of issuing a warrant. The form of the oath, when the testimony is taken orally, may be as follows: *You do swear, that you will make true answer to such questions as shall be put to you, touching the necessity and propriety of my issuing a warrant against RICHARD ROE, at the suit of JAMES JACKSON. So help you God.*" This is the form of the oath, when the witness swears by laying his hand on, and kissing the Gospels. When he is scrupulous of doing so, he may hold up his right hand, and the style then is, "*You do swear by the everliving God, &c.*" omitting the words at the conclusion, "*So help you God.*" If he be scrupulous of either of these forms, if he believe in a Supreme Being, and in a future state of rewards and punishments, the oath may be omitted entirely, and he may make his affirmation in this form: "*You do solemnly, sincerely and truly declare and affirm, &c.*" omitting the conclusion as before. This is the obligation, under which the people called *quakers*, generally testify. And the above difference of form runs through all the oaths authorized by the law of this state. (x)

The party, or witness should be questioned as to the debt or demand due, as well as the other circumstances rendering a warrant necessary; and it is advisable for the magistrate to reduce

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(w) Vid. Pennington on small causes, 27, 8.

(x) 1 N. R. L. 386.

this oath to the form of an affidavit, and to let the party making it sign it, not only with a view to a prosecution for perjury, should it become necessary, (y) but because the exercise of a proper care, to have all the proceedings preliminary to the warrant in writing, will save disputes in regard to its regularity, and repel any mistakes or inferences against it, should an action of false imprisonment be brought, which will, I conceive lie, against both justice and party, if the requisites of the statute be not complied with. (z)

## FORM OF THE AFFIDAVIT FOR A WARRANT.

SARATOGA COUNTY SS. *On application for a warrant, against RICHARD ROE, in favour of JAMES JACKSON, to PHILIP GREEN, Esq. one of the justices of the peace of the said county, he, the said JAMES JACKSON, maketh oath (or affirmation) and saith, that he does not reside in the said county of Saratoga, but that his residence is now in the town of K. in the county of Washington. [Or that he was lately informed by the said RICHARD ROE, that he, the said RICHARD ROE, was about removing out of the said county of Saratoga, where he now resides, to the town of W. in the county of Washington, which information this deponent verily believes to be true.] Or [that he has been informed by the said RICHARD ROE, and verily believes, that the said RICHARD ROE, is embarrassed in his circumstances, and that he intended to make some such disposition of his property, in trust, or in some other way as would prevent its being sacrificed by execution, or words to that effect.] Or [such other circumstances, as are calculated to show the grounds of the application.] And this deponent (or affirmant) further saith, that he, this deponent (or affirmant) hath, as he believes, a legal and valid demand against the said RICHARD ROE, of twenty five dollars; or thereabouts, over and above all discounts, due to him, this deponent (or affirmant) for and in consideration of certain goods sold by this deponent (or affirmant) to the said RICHARD ROE. And further saith not.*

JAMES JACKSON.

*Sworn before me, the 1st Sept.*  
1820.

PHILIP GREEN, *Justice.*

(y) Vid. Pennington on small causes, 28.

(z) 2 John. cas. 49. 11 John. 175.  
12 John. 248.

This affidavit should not be entitled (9) in any cause, because, from its nature, there cannot be any cause pending, at the time it is taken. (a)

In addition to the circumstance of the mere non-residence of the plaintiff, which is to be proved in the manner above mentioned, we have seen that the plaintiff must give security to the justice, for the payment of any sum, which may be adjudged against him. This may be by depositing a sum of money with the justice, sufficient to meet the full sum which may by possibility be recovered by the defendant, against the plaintiff. Upon this principle, \$5 was holden sufficient in an action of trespass, where there can be no set off, (b) though it is presumed, that in an action admitting a right of set off in the defendant, the amount should be 30, or \$55, according to the act under which the process is applied for; because the defendant may recover one of these sums, including costs.

But the most usual security, is some resident of the county, of sufficient estate, binding himself in the words of the act. — The mode in which the justice may satisfy himself of the sufficiency of such security, will be considered when we come to speak of security upon adjournments and judgments. The form of this security may be, either, by the surety coming before the justice, and acknowledging himself security in the terms of the act, called a *recognizance*, (c) which the justice

(9) The title of the Court is thus : *Justice's Court.*

The title of the cause is thus :

{ *James Jackson*  
v.  
*Richard Roe.*

Its meaning more at large, is as follows : *In a justice's court : James Jackson, versus (against) Richard Roe.* A cause is thus entitled when the written proceeding, to which the title refers, is on the part of the plaintiff. When it is on the part of the defendant, after giving the title of the court, the title of the cause is inverted thus :

**RICHARD ROE**

*ads.*

**JAMES JACKSON.**

That is to say, *Richard Roe, ad sectam (at the suit of) James Jackson.* This title always presupposes a cause commenced between the parties, and if an affidavit, in relation to a cause not commenced, should be entitled, no indictment would lie upon it for perjury. Vid. 2 John. 371, &c. and the head of appearance and pleading, *post.*

(a) Pennington on small causes,  
2 2 John. 371.

(b) 13 John. 481.

(c) 7 John. 18.



may afterwards reduce to writing at any time ;(d) or, which is the preferable mode of proceeding, the surety may sign a written contract of security, in the form we shall presently give. If the security be merely a parol contract, it is within the statute of frauds and void.(e)

## FORM OF THE RECOGNIZANCE.

SARATOGA COUNTY, SS. Be it remembered, that on the first day of September, A. D. 1820, (application having first been made to me, PHILLIP GREEN, Esq. one of the justices of the peace of said county, by JAMES JACKSON, a non-resident of the said county, for a warrant in his favor, against RICHARD ROE, (in a plea of trespass on the case) thereupon, personally came before me, the said justice, JOHN DOE, and acknowledged to owe to the said RICHARD ROE, sixty dollars, if default should be made in the following condition, which is, that he, the said JAMES JACKSON, shall pay to the said RICHARD ROE, any sum which may be adjudged against the said JAMES JACKSON, in the said cause commenced, or to be commenced, by the said warrant.

PHILIP GREEN.

## FORM OF A WRITTEN SECURITY, TO BE SIGNED BY THE SURETY.

Application having been made to Phillip Green, Esq. one of the justices of the peace of the county of Saratoga, by JAMES JACKSON, a non-resident of the said county, for a warrant in his favour, against RICHARD ROE, in a plea of trespass on the case (or as the plea is :) Now therefore, for value received, and according to the statute in such case made and provided, I do hereby agree with, and become bound to, the said RICHARD ROE. that, he the said JAMES JACKSON, shall pay to the said RICHARD ROE, any sum, which may be adjudged against him, the said JAMES JACKSON, in the said cause, commenced, or to be commenced, by the said warrant. Dated the 1st September, 1820.

JOHN DOE.

A letter, directed to the justice thus : " Please let Mr. T. have a warrant, and I will be accountable for the cost, J. H." is not a sufficient security. in the case of a non-resident plaintiff. It does not specify the suit, and is not an engagement to be accountable to the defendant, for whatever may be adjudged

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(d) Vid. I Chitty's Cr. L. 90, & (e) 7 John. 18, 19.  
authorities there cited.

against the plaintiff, and a mere liability for costs, is not enough. (f)

#### FORM OF THE WARRANT.

SARATOGA COUNTY, ss.

PHILIP GREEN, Esq. one of the justices of the peace of the said county : To any constable of the said county GREETING : In the name of the people of the state of New-York, you are hereby commanded to take RICHARD ROE, and bring him before me, the said justice, to answer unto JAMES JACKSON, in a plea of trespass on the case, to his damage of twenty-five dollars ; and do you notify the plaintiff thereof. And have then there this precept. Hereof fail not at your peril. Given under my hand, at the town of Saratoga Springs, in the said county, the 1st day of September, A. D. 1820.

PHILIP GREEN.

If the warrant issue upon cause shown, on oath, it is a good practice, though not necessary to its validity, to endorse it thus, "*On oath of plaintiff*" or "*On oath of A B,*" the witness who swore to the cause ; and, if in favour of a non-resident, add to the above, "*Non resident A B, security.*" And so in other cases, according to the fact.

#### SECTION III.

#### OF PROCESS BY ATTACHMENT.

This process is given by the 23d section(g) of the act for the recovery of debts to the value of twenty-five dollars. In order to obtain this process, the applicant must prove—1. That he has a demand against the defendant, not exceeding \$25 or \$50, according to the act, under which he applies. But if his demand exceed that amount, he may, without doubt, reduce it to a justice's jurisdiction, by a voluntary credit or endorsement, or by an express waiver of the excess. (h)

2. That he the defendant has departed the county ; or
3. That he is about to depart the county ; or
4. That he is concealed within the county ; and

(f) 12 John. 422.  
(g) 1 N. R. L. 396.

(h) Ante, 13. 12 John: 435. 1 John. cas. 25. id. 333. 3 Caines, 174.

5. That such *departure*, or, *being about to depart*, or concealment is with the intent, either,

1. To defraud his creditors, or

2. To avoid being personally served with process, to be issued by virtue of the act for the recovery of debts, &c. or the act to extend the jurisdiction of justices of the peace.

Such proof must be to the satisfaction of the justice, by at least one disinterested witness.

Under this statute, a justice of *Schenectady* county, issued an attachment against the goods of one *Dudley*, who resided in the county of *Schoharie*, upon which his goods were seized, while passing through the county of *Schenectady*; and a judgment, thereupon, rendered against the defendant. The Supreme Court reversed this judgment, on *certiorari*, declaring, that "the obvious intention of the act was, to give the process of attachment against a person who had absconded, or departed from his usual place of residence, and not where he might be occasionally travelling through a county."<sup>(i)</sup>

The constable, in this case, served the attachment on *Dudley*, by leaving a copy thereof at a store of the plaintiff, where *Dudley* had been shortly before, but the court pronounced the service insufficient, and it would seem, from their reasoning on this subject, that this process of attachment (as we before remarked,)<sup>(j)</sup> cannot be issued, except in the county where the defendant resides, or has lately resided; for, in addition to the remarks of the court, already noticed, they go on to say, that, "The provisions of the 24th section very strongly corroborate the construction, that an attachment cannot be issued in a case like the present. It is made the duty of the constable, to leave a copy of the attachment at the dwelling house, or other last place of abode of the defendant; and the provision is entirely evaded in this case; for it is absurd to consider the store of the plaintiff, where the defendant was for a few minutes, his dwelling house or last place of abode."<sup>(k)</sup>

But an attachment may issue, for a joint debt, against one of several joint debtors, or partners, who has absconded, &c. though the others remain behind.<sup>(l)</sup>

The proof, upon which the attachment issues, may be either oral or written, as in the case of a warrant, but had better be

<sup>(i)</sup> 15 John. 196, 7.  
<sup>(j)</sup> Ante, 260.

<sup>(k)</sup> 15 John. 196, 7.  
<sup>(l)</sup> 14 id. 217.

by affidavit, for the reasons mentioned in relation to the latter process ;(m) for, if it be irregular, trespass would lie against the justice, or party, for taking the goods, or entering on the defendant's premises, under the attachment.(n)

The proof of the plaintiff's demand, should be such as the justice would require to substantiate it on a trial ; for "*proof*, in law, means legal proof."(o) And if this evidence be taken by parol, the form of the oath to the witnesses may be as follows :

FORM OF THE OATH UPON WHICH TO GROUND AN ATTACHMENT.

"You (and each of you, *if more than one witness*) shall true answers make, to such questions as shall be put to you, touching the necessity and propriety of an attachment, against RICHARD ROE, at the suit of JAMES JACKSON. So help you God."

This oath is to be varied in form, to meet the scruples of the witness, as mentioned in the case of a warrant.(p) And in all cases, where an affidavit is made by affirmation, instead of oath, the style should be, "*A B, being duly affirmed, saith,*" or "*maketh affirmation and saith,*" instead of the more usual words, "*A B, being duly sworn saith,*" or "*A B maketh oath and saith ;*" and, in the body of the affidavit, the one who makes affirmation is styled *the affirmant*, instead of *the deponent*, usual in affidavits regularly sworn to ; and the above distinction, as to the form of oaths and affidavits shall suffice, without further repetition.

FORM OF AN AFFIDAVIT, ON WHICH TO GROUND AN ATTACHMENT.

SARATOGA COUNTY, ss.

*A* and *B* make oath and say, and first this deponent *A*, for himself saith, that he has seen *Richard Roe* write, and he verily believes, that the name appearing on a certain note here produced, and purporting to be subscribed to the same, is in the proper hand writing of the said *Richard Roe*; and this deponent *B*, for himself saith, that he has lately heard the said *Richard Roe* declare, that he the said *Richard Roe* was in embarrassed circumstances, as to property, or in words to that effect ; that a few days thereafter, he declared to this deponent, that he was afraid he should be obliged to leave the country, to keep clear of the continual clamour of his creditors, or in words to that effect ; since which time, this deponent has several times inquired at the dwelling house of the said *Richard Roe*, in the county of *Saratoga*, and was informed by his wife, that he had been

(m) Ante, 256, 7.

(n) 11 John. 175.

(o) 9 id. 75. 11 id. 175.

(p) Ante, 257.



gone from home some time on business. And further these deponents say not.

A.

B.

Sworn the 1st September, 1820,

before me,

PHILIP GREEN, *Justice.*

The circumstances to be detailed by the above oath or affidavit, must of course be as various, as the testimony which will establish a claim, or the facts which indicate a departure, intent to depart, or concealment of the defendant, with the intent specified by the act. The affidavit must, of course, be varied accordingly; and a precedent can be useful no farther, than to convey an idea of the form, in which the matter is to be expressed.

The affidavit should not be entitled, for the reasons mentioned in relation to the affidavit for a warrant; (q) and for the reason mentioned before, as to the oath or affidavit on which a warrant is to be granted, (r) the witnesses should be able to state facts and circumstances, and not merely their own inferences; so as to enable the magistrate to determine *judicially*, whether the attachment ought to issue. For, though this is not expressly required by the statute, as in case of a warrant, yet it is implied in sound legal construction, for the *proof* intended by the statute, means *legal and competent proof*. (s)

The leading case, on this subject, is that of *Vosburgh v. Welch*. (t) It was an action of trespass against the justice, *Welch*, for goods taken under an attachment issued by him, against *Vosburgh*, without oath. It appeared on the part of *Welch*, the justice, that, before issuing the attachment, against *Vosburgh*, he had issued an execution against him, on a judgment obtained before him, on which execution the constable had returned, that he could find neither goods, nor the body of the defendant; and it was contended that this was sufficient proof of *Vosburgh's* having absconded, to warrant the attachment. But the court overruled the defence, and sustained the action. They delivered their opinion, on this point, as follows: "The statute (Sess. 31, c. 204, s. 21) (u) requires the justice, before issuing the attachment, to have satisfactory proof offered him, of the departure or concealment of the debtor, with intent to defraud his creditors, or to avoid being personally served with process. A mere error in judgment, as to the legality of the proof offered, would not make the justice a trespasser, by issuing the attach-

(q) Ante, 258.

(r) Ante, 256, 7.

(s) 11 John. 175.

(t) *id.* & *vid.* 1 N. R. L. 398, s. 23.

By this section, the proof is required to be, by at least one disinterested witness.

(u) 1 N. R. L. 398, s. 23.

ment. But such proof, in order to give jurisdiction to the justice, ought, at least, to be *colourable*. He cannot act upon his *own knowledge*, or *mere belief*, on the subject, however well founded it may be. *Proof*, in the sense in which it is used in the act, means *legal evidence*, (9 John. Rep. 75.) or such species of evidence *as would be received in the ordinary course of judicial proceedings*. The evidence, upon which the justice acted, in this case, was not of that description. It did not amount even to the information of the constable, that the debtor had departed the county, or was concealed, with intent to defraud his creditors, or to avoid being served with process. The justice might have believed the fact upon mere report, or the information of some person in whom he had confidence. But this would not have been satisfactory proof, within the meaning of the act; nor was the return of the constable, on an execution against the debtor, any such proof. It was altogether foreign and irrelevant. The justice must be considered as having issued the attachment, without any proof whatever, of the departure or concealment required by the act; and, of course, without any authority."

It was subsequently made a question, in *Collins v. Ferriss*,<sup>(4)</sup> whether a justice might be pursued as a trespasser, who had issued an attachment on the plaintiff's *own oath only*; but the cause was determined on another ground. This, I should suppose, could hardly admit of a doubt, under the late act (1 N. R. L. 398, s. 23,) which, *in terms*, requires the proof to be, *by at least one disinterested witness*. Receiving the oath of the plaintiff, as the *sole foundation* for the attachment, could hardly be called *mere error as to the kind of proof*, within the meaning of the court in *Vosburgh v. Welch*; for there is not even a *colour* for such a proceeding. But where the attachment is regularly issued, the justice is clearly not accountable for any abuse of the constable in executing it; as if the constable should attach the defendant's arms and accoutrements, or other property exempt by law.<sup>(v)</sup>

Where the attachment is regularly issued, the justice cannot supersede it, although there was in fact no grounds for its issuing; but must go on and try the cause, on its return, the same as upon any other process. And where a justice of *Greene county*, upon sufficient proof, issued an attachment against one *Field*: on the return day, *Field* appeared and pleaded in abatement, *that before and at the time of issuing the attachment, he resided in Cocksuckie in Greene county, and had not departed, nor was he about to depart from the county, nor did he conceal himself within the same with intent to defraud his creditors, &c. or to avoid process, &c.*

(4) 14 John. 246.

(v) id.

To this plea the plaintiff demurred, and the justice gave judgment upon the demurrer for the plaintiff; which was holden right, on *certiorari*, for the above reasons.(x)

The mere fact of a constable not being able to serve a single warrant upon a traveller, who, for many reasons, might wish to avoid the arrest, without being chargeable with intent to defraud his creditors, is not that kind of evidence of concealment contemplated by the act.(x) But I should conceive that, in ordinary cases, diligent, but unsuccessful search, by an officer, in order to make a personal service of a justice's process, would be the most satisfactory kind of evidence, upon which to issue an attachment. It exhibits one of the *specific cases* supposed by the act; *a concealment to avoid the personal service of such process.*

Before this attachment issues, a bond, executed by the plaintiff, with one sufficient surety,(1) in the penalty of twenty-five dollars (or fifty dollars, if the process be under the fifty dollar act) conditioned to pay the defendant *all damages and costs*, he may sustain by reason thereof, if no judgment is obtained by the plaintiff.(y) It is doubtful whether a deposit of money with the justice, to this amount, would be sufficient, as the statute prescribes the form of the security.(z) But, if the plaintiff be absent, or a reasonable excuse be shown for his not being bound, as if he be sick, an infant, idiot, or lunatic, there can be no question that any other responsible resident of the county may be substituted in the bond, although the statute mentions the *plaintiff with one sufficient surety*: and with this agrees 1 John. 514, which authorizes a third person to make the requisite oath for an adjournment, although the statute seems to confine it to the *defendant himself*.(a)

#### FORM OF THE BOND.

Know all men by these presents, that we *James Jackson* and *John Doe* are held and firmly bound to *Richard Roe*, in the sum of twenty-five dollars; to be paid to the said *Richard Roe*, his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 1st day of September, A. D. 1820.

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(1) The mode of testing the sufficiency of sureties, will be considered *post*, when we speak of adjournments and executions.

(w) 9 John. 130.

(x) 15 John. 196.

(y) 1 N. R. L. 398, s. 23.

(z) 13 John. 481.

(a) 1 N. R. L. 389, s. 5.

The condition of this obligation is such, that if the said *James Jackson*, his heirs, executors, or administrators, shall pay the said *Richard Roe* all *damages and costs*, he may sustain by reason of a certain attachment to be issued against the goods and chattels of the said *Richard Roe*, at the suit of the said *James Jackson*, by *Philip Green*, Esq. one of the justices of the peace of the county of Saratoga, if no judgment shall be recovered against the said *Richard Roe* in the cause so to be commenced, by the said attachment, then this obligation to be void, otherwise of force.

*Jam. s Jackson,* (L. S.)  
*John Doe,* (L. S.)

SEALED AND DELIVERED,

IN PRESENCE OF

*Philip Green,*  
*John Stiles.*

The question has frequently been asked me, whether a defendant, suing upon this bond, may recover his damages *at large*, for the seizure of his goods, his time, trouble and expense of counsel, &c. in defending the cause? The reasoning of the Supreme Court, in the case of *Fitch v. The People, ex relatione Platt*,<sup>(b)</sup> seems to furnish an answer to this, interrogatory. The words *costs and damages*, as used in the act to prevent forcible entries and detainers, and which the justice is authorized to assess in favour of the complainant,<sup>(c)</sup> are there holden to mean merely the *taxable costs* of the suit. And Mr. J. Spencer, who delivered the opinion of the court, remarked, that "the word *damages* is considered, in the law, in two several significations, the one *properly* and *generally*, the other *relatively*: *properly*, when damages are founded upon the statutes where costs are included within the word damages, and taken as damages; *relatively*, when the injury declared on existed before the writ brought, and is the foundation of the suit; in such case damages do not mean costs. The evident object of the part of the statute under consideration was, to give costs to the party prosecuting, after the trial of the traverse, to re-imburse his costs on that particular occasion." Within this reasoning, there can be little doubt that the defendant would be confined in his recovery upon an attachment bond, to his mere *taxable costs*. If the proceeding be malicious, he has another remedy for his *damages at large*.<sup>(d)</sup>

On receiving the necessary proof and security, an attachment is then to be issued, dated, and returnable, within the times limited for a summons.<sup>(e)</sup>

<sup>(b)</sup> 16 John. 141.

<sup>(c)</sup> 1 N. R. L. 98, s. 5.

<sup>(d)</sup> Vid. 16 John. 142, 3, per Spencer, J.

<sup>(e)</sup> 1 N. R. L. 395, s. 23. Ante, 252.



## FORM OF AN ATTACHMENT.

SARATOGA COUNTY, ss.

*Philip Green*, Esq. one of the justices of the peace of the said county; to any constable of the said county, GREETING: You are hereby commanded, in the name of the people of the state of New-York, to attach the goods and chattels of *Richard Roe* (except such goods and chattels as are exempt from execution) and the same safely keep, to satisfy such judgment as may be rendered by me the said justice, against the said *Richard Roe*, in favour of *James Jackson*, (upon whose application to me this attachment is issued) in a plea of trespass on the case, to his damage of twenty five dollars; and do you make return hereof, at my dwelling house, in the town of Saratoga Springs, in the said county, on the 12th day of September instant, at one o'clock in the afternoon of that day. Hereof fail not at your peril. Given under my hand, at the said town of Saratoga Springs, the first day of September, A. D. 1820.

PHILIP GREEN.

For the *character* and *right* of the parties, who sue and are sued, the *nature* of the action, *amount* claimed, and *mode* of *dating*, see the first section of this chapter. These are the same in an attachment, as a summons.

## SECTION IV.

## TIME, MODE, AND EFFECT, OF ISSUING PROCESS; AND WHEN A DEFECT THEREIN IS WAIVED.

1. No process can be issued on *Sunday*. (f) It has been determined by the Supreme Court of Errors in Connecticut, after the greatest deliberation, that the term *Sunday*, or *Lord's day*, includes only the *solar day*, that is, the time between sun rise and sun set, so that *before sun rise*, or *after sun set*, of that day, process may be either issued or served, or any judicial act done. (g) This question has, I believe, never directly arisen and been decided by our Supreme Court; though the general idea with us is, as far as I have been able to learn, that *Sunday* includes the whole *natural day* of twenty-four hours.

2. It was some years ago determined by the Supreme Court, that a *general authority* from the justice to a constable, or any

(f) 12 John. 178.

(g) 2 Conn. Rep. N. S. 541.

one, to fill up, alter or make out process, is void ; and, though a direction to a constable, or other person to do this with regard to particular process, is valid, yet the court pronounced it indiscreet and imprudent.<sup>(h)</sup> The latter power has, therefore, been restricted by statute, (Sess. 43, ch. 159, s. 4,) by which it is enacted, "That it shall not be lawful for any justice of the peace to issue, or deliver to any constable, or to any other person, any blank summons, warrant, or other process, signed by such justice, in which the names of the plaintiff and defendant, and the cause of action, or either of them shall be omitted ; and every justice offending in the premises, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be subject to fine and imprisonment, or either, in the discretion of the court, and shall, thereupon, forfeit his office."

The act to redress disorders by common informers,<sup>(i)</sup> regulating the mode of commencing suits in certain popular, and *quidam* actions, relates to the courts of record only, and has no application to a justice's court.<sup>(j)</sup>

3. The issuing the original process of summons, warrant or attachment, is the commencement of the suit.<sup>(k)</sup> But what is an issuing of process ? A delivery thereof to the constable, would be clearly so. So would leaving it with the constable's wife, to hand over to him ;<sup>(l)</sup> and putting it in the mail, or giving it to a messenger directed to, or for the purpose of being conveyed to, a constable and served, is equally a commencement of a suit, as though the process were actually delivered to him.<sup>(m)</sup> And indeed leaving the process at the officer's house, or sending it to him, in any way, for the purpose of being served, amounts to an issuing or suing out process, and is therefore the commencement of a suit.<sup>(n)</sup>

4. Any irregularity in issuing process, and all manner of defects, either in its form or substance, are waived or cured, by the defendant's omitting to take advantage of it the very first opportunity. And if he plead in bar, or take any similar step, which supposes the process to be good, he cannot afterwards object to the process itself.<sup>(o)</sup> The same remark applies to a variance, between the process and declaration.<sup>(p)</sup>

But the mere act of appearing to the process, for the purpose of raising the objection, cannot be construed into a waiver of its defects ; for, if this were the case, there could be no such thing as an objection to process.<sup>(q)</sup>

(h) 10 John. 405.

(i) 1 N. R. Laws, 99.

(j) 2 Caines, 134.

(k) 3 John. cas. 145. 1 John. 283.

(l) 17 John. 63.

(m) 18 id. 14.

(n) 17 id. 63. 18 id. 14.

(o) 2 Caines, 134. 17 John. 63.

(p) 2 Caines, 134.

(q) 14 John. 481.

## SECTION V.

## OF PROCESS AGAINST JOINT DEBTORS.

At the common law, where there were two or more jointly indebted, and one kept out of the way, so as not to be served with process, the plaintiff, before he could go on against the others, must have pursued the absentee to *out lawry*.<sup>(r)</sup> This rule made a plaintiff remediless, in a justice's court, in which there was no process adapted to out lawry; and it seems that suitors in this court, remained under the same embarrassment as late as 1799, at which time a judgment against joint debtors was reversed, because all were not served with process.<sup>(s)</sup> To remedy this evil, it was shortly afterwards provided by statute, "That every summons or warrant, to be issued by virtue of the twenty-five dollar act, may issue against joint debtors, in the same manner as against individual debtors; and in case the same be duly served, in the manner directed by the act, upon either of such joint debtors, such joint debtor on whom the same shall be served, shall answer to the plaintiff, and the judgment shall in such case be against the joint debtor or debtors, on whom the same was so served, and against the other joint debtor or debtors, named in such summons or warrant in the same manner, as if such process had been served on all such debtors. *Provided, however, that no execution shall issue against the body, or any goods and chattels, the sole property, of any debtor, on whom process was not duly served as aforesaid.*"<sup>(t)</sup>

This section relates merely to a suit by *summons* or *warrant*. The justice, however, probably has the same power upon an attachment, for, by a subsequent section, in the same act,<sup>(u)</sup> he is authorized, on the return of the attachment, *to hear, try, and determine the cause, between the parties in the same manner as on summons returned personally served, &c.*

The provisions of this statute relate to those only who are joint debtors, *legally so called*, that is, *debtors upon some matter of contract, judgment, &c.* And not to those who have committed a joint trespass, or other wrong;<sup>(v)</sup> for wrong doers could always be sued jointly or severally, though, we have seen, it was otherwise with joint debtors.<sup>(w)</sup> And where a justice gave

(r) Vid. 1 Dunlap's N. Y. Pract. 140. 6 John. 61.

(s) 1 Caines, 594, note.

(t) 1 N. R. L. 396, s. 16.

(u) id. 399, s. 25, and vid. 14 John. 217.

(v) 2 John. 365. 12 John. 434.

(w) id. & vid. 6 John. 61.

judgment against two joint trespassers, on process served upon one only, the judgment was reversed on *certiorari*.(x) Though in such case, there can be little doubt that the justice may treat the defendants as severing, and go on to judgment, against the one who is taken, or personally served.(y) And where, in such case, the plaintiff declares against the one served with process, or brought into court, alledging that he committed the wrong *with the others* named in the process, and he pleads not guilty or otherwise, and goes to trial upon the merits, this cures all defect in the declaration,(z) and, in such case, it is perfectly proper, for the plaintiff to declare against those who are personally served or brought in, and to disregard the others, or declare that he will not further prosecute as to them ;(a) and if he declare against all, stating that certain ones were not served with process, this is only saying, that *those who are served* committed the wrong, *with those not served*, and is good after verdict ;(b) and would probably be considered mere matter of form in a justice's court, provided the judgment be right.

In this proceeding against joint debtors, the judgment is to be against all, and the execution issues in the same form, but neither the body, nor sole property of those not served, can be taken in execution, nor can their property be taken, in which they are tenants in common with those served.(c)

In an action on the judgment against all the defendants, the record or the judgment would be, *prima facie*, evidence against all, as well those originally served with process, as those who were not served ;(d) but those who were not served may enter again into the merits, and show any matter which might have been set up as a defence in the first action.(e) In such case, therefore, the defendants cannot deny the record or judgment, for that is good and valid ;(f) nor is it sufficient for them to plead that they were not served with process,(g) or if they do so, they should at any rate go farther and set up, in their plea, or notice, a defence against the ground or cause upon, or in which the judgment was given.(h)

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(x) 12 John. 434.

(y) id.

(z) 2 John. 365.

(a) 1 Wils. 30, 306.

(b) 2 John. 365.

(c) 6 John. 59. 1 John. 62. 2 John. 87. 6 John. 98.

(d) 16 John. 66.

(e) id.

(f) 2 John. 87.

(g) 6 John. 98.

(h) id. & vid. 16 John. 66.



## CHAPTER IV.

### OF THE SERVICE AND RETURN OF THE ORIGINAL- PROCESS.



#### SECTION 1.

#### OF SERVING THE SUMMONS.

THIS process must be served, at least, six days before the time of appearance mentioned therein, *by reading the same to the defendant, and (if he require it) by delivering him a copy.*— This is, in case the defendant shall be found. *(i)*

If not found, the service is, *by leaving a copy of the summons at the defendant's house, or place of abode, in the presence of some one of the family, of suitable age and discretion, who shall be informed of its contents.* *(j)*

The six days are computed, as we mentioned before, one day inclusive and one exclusive, so that a summons returnable on Friday, must be served as early at least, as the Saturday preceding. *(k)* The constable is to find the defendant, if he can : but he is not bound to look for him at any other than his usual place of residence ; for this is what the statute means by *his house or place of abode.* *(l)* And it is at *such place*, that the copy is to be left, when the constable cannot find the defendant ; and not where he may have been on *business, visiting* or may have stopped on his travels, or the like. *(m)*

The constable shall, *on the oath of his office* (that is, in pursuance of his official duty,) *(n)* return thereon the *time and manner* he executed the same, and sign his name thereto. *(o)*

*(i)* 1 N. R. L. 398, s. 2.

*(j)* id.

*(k)* Ante, 143, 4. Pennington on small causes, 21.

*(l)* Pennington on small causes, 21.

*(m)* id. & vid. 15 John. 196.

*(n)* Pennington on small causes,

21, 2.

*(o)* 1 N. R. L. 398, s. 2.

As this service is, in the one case to enable the justice to proceed and give judgment, *ex parte*, or, in the other, may form the foundation of a warrant, the constable should be particular in the service and return he makes. In the case of personal service, the summons should be *actually read* to the defendant, and in his hearing, unless he *expressly* waives that formality, or evades the hearing it, by leaving the constable or otherwise ; in which cases, information of its contents, or an unsuccessful attempt to read it in the defendant's hearing, would, without doubt, be considered equivalent to a literal compliance with the statute.

Where he leaves a copy, he should inscribe it thus :

" A COPY,

*Thomas Noakes, Constable."*

This is, in order that the defendant may have full notice of the authority, by which the process is served.

He should inform himself, by proper inquiry, and in the best way he can, of the defendant's usual residence, as well as the fact whether the person, in whose presence he leaves the copy, is of the proper age and discretion, and a member of the family. The information of its contents should convey a clear idea of the name of the magistrate who issued the summons, the parties plaintiff and defendant, and the time and place of return. The age of legal discretion is 14 years,<sup>(p)</sup> and as the return of the officer should, as far as possible, contain facts and not inferences, perhaps the constable should be able to state in his return, that the member of the defendant's family, in whose presence the copy was left, &c. was of the age of 14 or upwards. The statute of New-Jersey makes this the express duty of a constable,<sup>(q)</sup> and, by our statute, he is required to state *the manner of service*. If this expression would not authorize him to say *generally* in his return, that he left it in the presence of a person of *suitable age and discretion*, but if the justice is to determine the competency of the service in this respect, from the particulars contained in the return, it should certainly mention the age of 14 or upwards ; for the law will not infer a suitable discretion in a person, under this age.— But, whether the return should contain this fact or not, the constable should regulate his own discretion, as far as possible, by

(p) 1 Blac. Comm. 490.

(q) Pennington on small causes,

legal rules, and should in fact be satisfied that such person is of the age of 14, at least.

He should, in his return to the summons, state the *manner of service*, and he should specify the particular manner in which this was done, and not return "served," or "served as the law directs," or "personally served," or "served by copy," or other loose expression, having no legal meaning attached to it, (as is too commonly the case,) because the justice should know the particular manner, in which the summons was served in order to judge if the law has been complied with.<sup>(r)</sup> The constable must also specify the day of the service, or the judgment will be reversed, if the objection be seasonably made; and appearing to make the objection, is not a waiver of the defect.<sup>(s)</sup>

FORM OF THE CONSTABLE'S RETURN, WHERE THE SUMMONS IS SERVED BY READING.

SARATOGA COUNTY, ss.

I served the within summons on the defendant, on the 5th day of September instant, by reading the same to him, he not requiring a copy. Dated the 12th day of September, 1820.

Fees, \$1.00.

Thomas Noakes, Constable.

FORM, WHERE IT IS SERVED BY READING AND DELIVERING A COPY.

SARATOGA COUNTY, ss.

I served the within summons, on the defendant, by reading the same to him, on the 5th day of September instant, and at the same time delivering a copy to him at his request. Dated September 12th, 1820.

Fees, \$1.00.

Thomas Noakes, Constable.

RETURN OF SERVICE BY COPY.

SARATOGA COUNTY, ss.

I served the within summons, on the 5th day of September instant, by leaving a copy of the same at the place of abode of the defendant, in the presence of A. B. one of the family, of the age of 14 years and upwards; at the same time informing the said A. B. of the contents of the said summons, the said defendant not being found. Dated September 12th, 1820.

Fees, \$1.00.

Thomas Noakes, Constable.<sup>(t)</sup>

(r) id. & vid. 14 John. 481.  
(s) 14 John. 481.

(t) Vid. Pennington on small causes, 21, 2.

Should there be several defendants, some of whom are served personally, and some by copy, the above forms can easily be modified and adapted accordingly. And should he be incapable of making any service upon some of the defendants, they not being found, and not having any, or the constable not being able to find out their residence within the county, or there being no person in whose presence the copy can be properly left, the constable may state this in his return, thus :

“ A. B. and C. D. defendants named in the said summons, not found ; and any dwelling house or place of abode of either of them not found.”

Or if no person, of suitable age and discretion, be found at their dwelling house, &c. say,

“ A. B. and C. D. defendants named in the said summons not found, and any person of suitable age and discretion, to be informed of the contents of the said summons, being a member of either of their families, not found at either of their dwelling houses or places of abode.”

These negative additions, however, would probably not be material to enable the justice to proceed and give judgment, or issue a warrant, according to the nature of the service, against such defendants as are returned served. But it would perhaps be well to state, in some form, the non-service on those who have not been reached by the summons, as well out of compliance with the like course in courts of record, as to prevent any possible implication of service against joint debtors, who though not served, are liable to have judgment against them in the manner we noticed ante, p. 269, 70. They ought therefore, to have every facility afforded them for a defence against an action on the judgment, the operation of which is determined by the constable's return. The officer may, therefore, either adopt the above special additions, or add merely “ the said summons not served on A. B. and C. D. the other defendants named therein.”

We have seen, that this return is to be made under the constable's oath of office ; and should he return falsely, an action would lie against him at the suit of the party injured ; (u) and should he do so wilfully and corruptly, he might also be indicted for a misdemeanor. (v)

(u) 14 John. 481.

(v) Pennington on small causes, 21, 2.



It is said, that in case of service by copy, the reason why it should appear in the return, that the defendant was not found is, that it is only where the defendant is not found, that this manner of service can be resorted to ;(w) and this ought to appear by the return, as an evidence of record, that the summons was legally served.(x)

In case the defendant doth not appear the justice should be careful not to proceed until the return be made as required by the act, for it is on that his authority to try the cause depends, if the service be *personal* : and he must look to the same source for authority, to issue a warrant, if the service be *by copy*.(y)

The constable's return is conclusive upon the defendant; and the truth of it cannot be traversed, or questioned by the defendant, on a plea in abatement or otherwise, in the cause in which it issues.(z) But if it be false in any particular, the defendant may question it, in an action against the constable for a false return.(a)

If the outer door of the defendant's dwelling house be shut, the officer will be a trespasser, if he enter it to make service of the summons without license,(b) but he should, where admission is refused, make service, if possible, by reading the process aloud at the door, if he ascertain that the defendant be within, or leaving a copy there, with the suitable explanation, if the defendant be absent, and any proper member of the family be within his hearing. And if the defendant himself, refuse him admission, besides reading the summons aloud at the door, it would be advisable, in order to render the service more effectual, to leave a copy there, though not requested, proclaiming aloud that he does so.

This process cannot be served on Sunday,(c) nor upon an attorney, counsellor, solicitor, judge, or other officer of any court of record in this state during the session of the court, to which they belong, unless sued with others, who are not privileged.(d) Nor can a summons be served upon any voter for Members of Congress, at any time between the day preceding, and the day succeeding, the closing the poll of any congressional

(w) 1 N. R. L. 333, s. 2.

(x) Pennington on small causes, 22, 3.

(y) id.

(z) 14 John. 481, 2.

(a) id.

(b) Vid. cases cited I Dunlap's N. Y. Pract. 152.

(c) 2 N. R. L. 17, s. 5.

(d) 1 N. R. L. 337, s. 1. 15 John. 242. 13 id. 252.

al election ;(e) nor upon a voter for Governour, Senators or Assemblymen of this state, during the same period.(f)

The constable may serve a summons in his own favour, he being named plaintiff therein.(g)

## SECTION II.

### OF THE SERVICE AND RETURN OF THE WARRANT.

Upon a warrant, the defendant is actually arrested and brought before the justice who issues the warrant, or if he be absent, or unable to try the cause, before the next justice of the city or county. The warrant also generally directs the constable to give notice of this arrest to the plaintiff. The statute allows fees for this duty.(h) though I do not perceive, that it gives him any express direction to perform it. I believe it is universal in practice, for the constable to do this, and where it is directed by the warrant, the notice is equally effectual as if it proceeds directly from the justice. The very nature of the proceeding implies the necessity of notice from some one, and the defendant should be detained in custody a reasonable time for this purpose. The return is indorsed on the process as in other cases, and may be to this effect :

#### FORM OF THE RETURN TO A WARRANT.

SARATOGA COUNTY, ss.

I have taken the body of the within named defendant, and have him now here in court, and I have this day duly notified the plaintiff thereof. Dated the 12th day of September, A. D. 1820.

Fees, \$1.25.

Thomas Noakes, Constable.

If there be several defendants, some of whom are not found, add that fact accordingly : " A. B. and C. D. the other defendants, not found."

We have already noticed, generally, what ceremony will amount to an arrest of the defendant's person.(i)

(e) 2 N. R. L. 246, s. 4.

(f) id. 259, s. 26.

(g) 4 John. 486.

(h) 1 N. R. L. 399, s. 26.

(i) Ante, 191.

Certain persons are *privileged* from arrest. This privilege, is 1. *personal*. Ambassadors, and other publick ministers of a foreign state, or any of their domesticks, or domestick servants, are thus privileged. (j) But this does not extend to a citizen of the United States, who enters the service of such ambassador, or other publick minister, if the debt for which he is sued, were contracted before he entered such service; and he may be arrested for such debts, the same as any other person. (k) The penalty imposed by our act of Congress, for arresting the servant of an ambassador, &c. does not attach, unless his name has been registered with the secretary of state, and by him transmitted to the marshal of the district, where Congress resides; (l) but still the arrest will be void, though the name be not registered. (m) The person arrested, must be a servant in good faith, at the time of the arrest. But the privilege extends to servants of a publick minister, being natives of the country where he resides, as well as to his foreign servants; and not only to servants lying in his house, but also to real and actual servants, lying out of his house; and not merely to his domestick servants, but to his secretary. A person pursuing trade, or other profession or employment, although receiving wages, cannot be considered as *bona fide* a domestick servant.—Consuls are not considered publick ministers, nor, consequently, privileged from arrest. (n)

Members of Congress, in actual session, or actually going to, or returning therefrom; (o) and members of the state Legislature, their servant and servants, while the same is in session, and while they are going to, and returning from such session, provided such time do not exceed fourteen days, are equally privileged from arrest. (p) but if a member of the state Legislature arrive at his home, within the fourteen days, his privilege thereupon ceases. (q) Attornies, counsellors, solicitors and judges, and other officers of any court of justice, during the sitting of the court to which they belong, but not so if sued with another who is not thus privileged. (13 John. 252) (h) Married women; (i) voters at any election, between the day previous, and the day subsequent to the closing of the poll; (j) the militia, from sun rise to sun set, of parade day; (k) non-commissioned officers and privates of the army of the United States, in a

(j) Burr. 2016. Act of Cong. April 30th, 1790, s. 25, L. U. S. vol. 2. p. 97.

(k) Act of Cong. last cited, s. 26.

(l) id.

(m) 3 T. R. 79.

(n) Vid. cases cited 1 Dunlap's N. Y. Pract. 95, 6.

(o) Constitution, U. S. Art. I, s. 6. 2 John. cas. 222.

(p) 1 N. R. L. 122.

(q) 1 John. cas. 415.

(h) 1 N. R. L. 387, s. I.

(i) 6 Mod. 17, 87. Str. 1272. 1 Lev. 216.

(j) 2 N. R. L. 246, 259.

(k) Laws, sess. 41, ch. 222, s. 14.

suit for any debt less than 20 dollars, contracted before enlistment, or for any debt whatever contracted after enlistment; (l) non-commissioned officers, musicians, seamen and marines, enlisted into the service of the United States, during their term of service, for any debt or contract; (m) the parties to a suit, witnesses, jurors, &c. in coming to, attending upon and returning from court; (n) bail attending court to justify, and all other persons having any relation to a cause, which calls for their attendance at court, to the same extent, going, returning, &c. (o) And, I suppose, upon the same principle, a next friend, or guardian, admitted to prosecute or defend for an infant, going, returning, &c. are privileged from arrest. An infant or lunatick are liable to arrest the same as any other person. (Vid. cases cited 1 Tidd, 183. Ante, 145, 6.)

2. This privilege is *temporary*. No person can be arrested upon this process by warrant on Sunday; (p) Such arrest is absolutely void, and all concerned in it, are liable for false imprisonment. (q) And if a person be detained on Sunday against his will, to be served with process on Monday, the service will be void. (r) If the defendant escape from the officer, without his assent, he may be retaken on Sunday; (s) though an original service of any kind of process, in a civil suit, cannot be made on this day. (t) But according to a decision of the Court of Errors in Connecticut, Sunday embraces the solar day only, (i. e.) between sun rise and sun set. (2 Conn. Rep. N. S. 541.)

3. This privilege is *local*. A question of privilege, frequently arising in a justice's court is, where the defendant, in order to avoid an arrest, shuts the outer door of his dwelling house, and sets the officer at defiance. This he may do, and the officer has no right to open it without license, even though it be not fastened. This principle was carried so far, in one case, that where a deputy sheriff knocked at the door of one *Parkes*, whose wife came and opened the door to see who was there, and the deputy, and those with him, pressed in with violence, and arrested a man who lodged in the house, it was held that the first entry, was unlawful, the opening of the door being occasioned by craft. (u)

(l) R. Laws, U. S. vol. 3, p. 456, ch. 269, s. 23. id. vol. 4, p. 826, ch. 760, s. 7. id. vol. 4, ch. 147, s. 5, p. 163.

(m) 3 R. Laws, U. S. 97, July 11, 1798, ch. 89, s. 5.

(n) Vid. Tidd's Pract. 174. 1 Caines, 115. 2 John. 294. 7 id. 538.

(o) 1 H. Bl. 636.

(p) 2 N. R. L. 195. 3 John. 257. Salk. 78, pl. 1. 1 T. R. 265.

(q) 2 Salk. 78.

(r) 1 Anstr. 85.

(s) 7 John. 155. Id. Raym 1028, S. C. Salk. 626, 287, pl. 7. Salk. 78, n. a. Barnes, 374. 5 T. R. 25. 6 Moll. 95.

(t) 2 N. R. L. 195.

(u) Hob. 62.



But if the constable find the outer door open, or otherwise enter peaceably, he may, especially after being refused admittance on demand, break open inner doors, in order to make the arrest; and even a steady boarder or lodger, who has a room by himself, is not protected from having the door of his room broken, on a warrant to arrest him, where the entry at the outer door is legal, for this is not his dwelling house within the meaning of the law.(v) And so if a man lets out his house, reserving a room to himself, it is no protection to him, if the officer get regularly into the outer door of the main building,(w) and even a previous demand of entry at the inner door, is not necessary in any of the above cases.(x) The outer door does not mean the front door only, but the officer may enter the back door of the dwelling house, if it be open, and especially if it be the usual place of entry;(y) and a peaceable entry may be made into a defendant's house, upon suspicion that he is there, though it turn out to be a mistake.(4 Taunt. 628, per Gibbs, J. 5 Taunt. 765.)

But a man's house is only a protection for himself, and shall not protect any one who flies to it; and his outer door may in such case be broken, to arrest the fugitive, after a denial on request made. A man's house is a protection only to himself and his family (z) But an officer cannot justify breaking even the inner door of a stranger, to search for the defendant, upon mere suspicion that he is there; and if it turn out that he is not there, an action of trespass lies.(a)

This privilege is confined to the actual dwelling house, and does not extend to a store, barn, or other out house, disconnected from the dwelling house, and forming no part of the curtilage.(b)

And where the constable has once made the arrest, if the defendant escape without the constable's consent, his own or any other dwelling house forms no protection against a recaption, but the officer may break outer doors to seize his body, or may retake him on any day, or at any place, or on any business, which would otherwise operate as a privilege from arrest; for the party is still considered in custody, and it is not an original taking.(c)

(v) Cowp. 1.

(w) 5 John. 352.

(x) Cowp. 1. 5 John. 352. 4

Taunt. 618.

(y) 17 John. 127.

(z) 5 Co. Semayne's case, 5

res.

(a) 6 Taunt. 246. 5 Taunt. 765.

(b) 16 John. 237.

(c) 2 Ld. Raym. 1023. 2 Salk. 626.

It is not necessary that the constable, having the authority, should be the hand which arrests, nor in the presence of the person arrested, nor actually in sight, nor is any exact distance prescribed. It is sufficient, if he be *bona fide* and strictly engaged in the business of the arrest, though another make the actual arrest by his direction; and he will, for the purpose of authorizing it, be deemed constructively present.(d)

Generally, in case of personal privilege, the defendant must avail himself of it by pleading it, or moving for a discharge from the arrest, but the officer, or others concerned, will not be liable to an action, unless they act maliciously.(e) The only exception I think of, is, that of ambassadors, &c. with their servants, &c. whose arrest is, like one on Sunday, made void by statute.(f)

If it be necessary, after an arrest, the constable may confine the defendant in a house, or other place of security, or place him in the gaol (with the leave of the sheriff) for safe keeping, a reasonable time, or for an hour or two, whilst he looks for assistance; or during a night, if the arrest is so late that he cannot get to the justice's before sun down; but in general, he is to take him by the most direct rout, and in the most convenient time to the justice who issued the warrant;(g) and so on, if he be absent, &c. to the next justice.

The better opinion would seem to be, that a constable cannot serve a warrant in his own favour, though it would be otherwise of a summons.(h)

The constable may (and ought, if need be) to take the power of the county, viz. what number of persons he shall think good, to aid him to execute in every behalf, the people's process, be it whatever kind; it being the people's commandment; and such as shall not assist him herein, being required, shall pay a fine to the people; and, in such case, the constable may command, and ought to have, the aid and attendance of all gentlemen, yeomen, husbandmen, labourers, tradesmen, servants, and apprentices, and of all other such persons, being above the age of 15 years, and that are able to travel.(i) And, in such case, they are not appointed any number, but it is referred to the discretion of the constable, what number he will have to attend

(d) 10 John. 88. Cowp. 65.

(e) Vid. cases cited 1 Tidd, 183. Doug. 671.

(f) id. Ante, 277.

(g) Griffith's Treatise, N. Jersey, 63.

(h) Cro. Car. 416. 4 John. 486.

(i) Dalt. Sheriff, 354, 5. Ritson's Constable, 2 ed. 40.

upon him, and in what manner they shall be armed, weaponed; or otherwise furnished.(j)

SECTION III.

OF THE SERVICE AND RETURN OF AN ATTACHMENT.

This is pointed out by the 24th section of the act upon which we are treating;(k) by which the constable is directed, on receiving this process, "to attach, take and safely keep the goods and chattels of the defendant, to satisfy the judgment to be rendered in favour of the plaintiff, and also to leave a copy of such attachment at the dwelling house, or other last place of abode of the defendant."

The kind of goods which may be taken upon this attachment, the manner in which a levy is to be made, what acts amount to a levy, and the power of the officer in breaking doors to effect it, &c. are governed by the same rules in all respects, as are applicable to executions; and will be spoken of at large under that head.

Other points, peculiar to the mode of serving and returning this process, will be noticed here.

1. On taking the goods, the constable is at his peril to see that they are safely kept. He is considered in the light of a bailee, and accountable to either party for ordinary negligence, by which either sustains an injury. This is upon the principle that the bailment is mutually beneficial, both to the bailor and bailee;(l) though if they be lost or destroyed, without his fault, he is not accountable.(m) He is, therefore, to provide such convenient place for their safe keeping, as shall comport with his rights and duties in this respect.

But the statute, in the section last quoted, provides "that he shall not remove or convey away the property, if on attaching the same, a bond, with good and sufficient security, be given to the plaintiff, in the penalty of fifty dollars, conditioned that such goods and chattels shall be produced, to satisfy any execution, which may issue upon any judgment to be recovered, &c.

(j) Dalr. Sheriff, 355.

(k) 1 N. B. L. 398.

(l) Ante, 32.

(m) 6 John. 9. Ante, 160.

The constable here has a discretion to exercise, as to the sufficiency of the security to be taken ; and he will undoubtedly be protected, if he exercise it in good faith. It cannot be doubted, that any man reputed to be in good circumstances, and apparently of ample property to pay the penalty, being, at the same time, a house holder of the county, would answer to the description of good and sufficient security, within the spirit of the act ; and, in such case, the constable would be indemnified in taking such bond, even though the surety should in the end prove insolvent. But the constable would, on the other hand, certainly be liable in an action on the case, for the plaintiff's loss, should he accept of a man whom he knew to be, or who was reputed in doubtful circumstances ; and in such case very slight proof of insufficiency, would be enough to throw the burthen upon the constable, of showing that he acted with due caution ; for the security was either known to him, or he ought to have taken the proper time to inquire.(n)

#### FORM OF THE BOND.

KNOW ALL MEN BY THESE PRESENTS, That I, *John Stiles*, am held and firmly bound unto *James Jackson*, in the penal sum of fifty dollars, to be paid to him, his executors, administrators, or assigns ; to which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal. Dated the 5th day of September, A. D. 1820.

Whereas *Thomas Noakes*, one of the constables of the county of Saratoga, by virtue of a certain attachment, issued by *Philip Green*, Esq. one of the justices of the peace of the said county, on the application, and in favour of the said *James Jackson*, against the goods and chattels of *Richard Roe*, hath attached the goods and chattels of the said *Richard Roe*, viz. one feather bed, of the value of twenty dollars, one coverlid of the value of eight dollars, (and so on enumerating the articles, with their value particularly.) Now, therefore, the condition of this obligation is such, that if the said goods and chattels shall be produced, to satisfy any execution, which may be issued upon any judgment to be recovered by the said *James Jackson*, on his said application, then this obligation to be void : otherwise of force.

*John Stiles, (L. S.)*

SEALED AND DELIVERED,

IN PRESENCE OF

*Ira Denn,*

*John Fenn,*

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(n) Vid. Bull. N. P. 60.



Every bond, or other deed must be sealed. Sealing in the law means an impression upon wax, or wafer, or some other tenacious substance, capable of being impressed, and a scrawl with a pen, of (L. S.) or other sign, at the end of the name is not a seal. (o)

I have supposed the value of the articles attached, to be inserted in the bond; not because this is absolutely necessary, but affixing a reasonable value is one additional step towards attaining certainty, and preventing future disputes in relation to it, should a suit upon the bond become necessary; and it is the excellence of every contract, that it be made as clear and certain as possible. Should the security refuse to affix a reasonable value, the constable might refuse to receive the bond, and consequently might remove the goods.

The attachment being once executed, is a valid lien on the goods against any other execution or process, against the same goods, from any court whatever, *not previously levied upon them.* (p) But if no judgment be obtained by the plaintiff, the lien is of course gone; and so, if, after judgment, the plaintiff doth not take out and proceed upon his execution, with all due diligence, he loses his preference. (q) Within what time this must be done, is still unsettled in this state. In Connecticut, unless execution issue in sixty days, after a judgment upon an attachment, the plaintiff loses his priority over others. (r) This practice is hinted at, as having some authority with us, by the Supreme Court. (10 John. 132.) And as the plaintiff cannot, without oath, in ordinary cases, obtain execution short of thirty days from the time of his judgment, which execution is in life thirty days more, there seems good reason, in proceedings under the twenty-five dollar act, for considering the Connecticut rule as the true one with us, at least, as a general rule; and unless the lien be renewed within the sixty days, by an execution levied, the property ought, perhaps, to be delivered up. This must, of course, be subject to exceptions; and sometimes the plaintiff ought to proceed much short of the sixty days, as where he is entitled to his execution of course, upon obtaining his judgment, without being stayed the usual term of thirty days, or in case of judgments against men having no families, not being freeholders, &c. The rule ought, also, to be different, and the time extended, within the same reason, when the proceeding is under our fifty dollar act, in which case the execution would run ninety days,

(o) 5 John. 239.

(p) Ante, 221 to 225, & vid. 10 John. 129. 13 id. 249.

(q) 10 John. 129, 131, 2.

(r) Kirby, 40.

(s) and might be stayed, by security, three months. This time must, therefore, after all, depend much upon the circumstances of each particular case.

The property is protected against other attachments, executions, &c. whether it be removed by the constable, or left, upon taking a bond, as security for its delivery.(t)

2. Having taken the goods, such as can be found, the constable is required, by the same twenty-fourth section, to complete the service, by also leaving "a copy of the attachment, at the dwelling house, or other last place of abode of the defendant." This copy should be inscribed "*Copy*," and signed by the constable as directed, ante, p. 272, in relation to a summons.

This copy should not be left at a house, or store, where the defendant has just stopped on his travels or the like; for it would be absurd to consider this his dwelling house, or last place of abode. It should be left at his usual residence.(u)

Although the act prescribes no time within which the goods should be attached, and the copy of the attachment left, yet it is advisable to do both, so as to have the service complete, at least six days before the return day of the process, to be computed as on the service of a summons.(v) It must expressly appear in the return, that this copy was left,(w) and reasonable notice should, at any rate, be given; for although the defendant may have departed the county, yet he may have left a family, or attorney to defend the cause.(x) The day of attaching the goods, and leaving the copy, ought, therefore, to be specified in the return, together with the particular goods attached. This should be done, not only to enable the justice to see, that the goods and chattels taken are subject to the attachment, and not exempt, as arms, accoutrements, choses in action, &c. but that both the plaintiff and defendant, and, indeed, third persons, may learn of record, what goods are holden under the attachment, to answer the final judgment.

Having executed the attachment, and either removed or secured the goods, where they are, or taken the requisite bond for their production, he is next required by the said section twenty-four, "on the return day of the attachment, to return the same to the justice who issued the same, and the manner of executing the same, together with such bond, whenever he shall have taken one."

(s) Laws, Sess. 44 ch. 64, s. 10,

(r) Ante, 271.

11.

(u) 16 John. 121.

(t) 10 John. 131.

(x) id. 122.

(24) 15 id. 197.

This return, although not made so in terms, as in case of a summons, is, like all other acts required of the constable by law, a part of his official duty, under his oath, and the same consequences would follow from a violation of this duty, as we noticed in relation to a false return to a summons. (y)

## FORM OF RETURN TO ATTACHMENT.

## SARATOGA COUNTY, ss.

As I am within commanded, I did, on the 5th day of September instant, serve the within attachment, by attaching certain goods and chattels of the within named *Richard Roe*, which said goods and chattels are more particularly mentioned and described, in the schedule hereunto annexed; and, on the same day, leaving a copy of the said attachment, at the dwelling house of the said *Richard Roe*, in the town of *Saratoga Springs*, in the said county. I now have the same goods and chattels in my custody, for the purpose within mentioned. Dated the 12th day of September, A. D. 1820.

*Thomas Noakes*, Constable.

*Annex a schedule, or inventory of the goods taken, to the precept,*  
~~thus:—~~

- One feather bed,
- One coverlid,
- One bureau,
- One axe,
- One spade, &c.

As the defendant has frequently departed with his family, it is more proper, where this is the case, to substitute the words, "*last place of abode*," for the words, "*dwelling house*," in the above return.

If a bond has been taken, instead of the words, "*I now have the same goods and chattels in my custody*," &c. say, "*The manner in which I have further executed the within precept, appears by the bond herewith returned*."

This return of the constable is, without doubt, equally conclusive with that upon a summons, and cannot be drawn in question, except in an action for a false return, or upon indictment. (z)

(y) Ante, 274. Vid. 6 John. 490.  
 per Clinton, Senator.

(z) Ante, 275. 14 John. 482.

The better opinion would seem to be, that a constable cannot execute an attachment in his own favour. (a)

#### SECTION IV.

#### CERTAIN POINTS IN RELATION TO THE SERVICE AND RETURN OF PROCESS, NOT REDUCIBLE TO THE FORE-GOING HEADS.

1. All defects in the return of process are cured, or waived, by the defendant's appearing and pleading in bar, or indeed, taking any step which supposes the return to be valid. (b) The rule is that the objection must be made in the very first instance, and it extends not only to a summons, warrant, and attachment, but to a venire or any other process, which operates as the foundation for some subsequent step in the cause. (c) -- But the mere act of appearing, for the purpose of raising the objection, will not be construed into a waiver, and it is, undoubtedly, enough, that the party take his objection at any time before he himself has taken some step, or suffered some act to be done, which would presuppose its validity (d) The same doctrine relates to a defect in the process itself. (e) Thus, should the defendant apply for an adjournment, or plead in abatement any matter not relating to the defect, demur, plead in bar, &c. &c. this would be a waiver of the defect in the original process or return. And so, if there be a defect in a venire or return, but the party suffer the jury to be sworn, or go on to trial without making the objection. (f)

2. The returns on all process may be either endorsed thereon, or be in the inner side, or annexed thereto. (g) In such case, the words of reference to the process, used in the return, should be adapted accordingly.

3. The constable cannot make a deputy to execute the process, directed, to him, but must execute it in his own proper person. (h) The justice may, however, at the request of the plaintiff, if he judge it expedient, depute some proper person, other than a constable, who will voluntarily undertake to exe-

(a) Vid. 4 John. 486. Cro. Car. 418.

(b) 17 John. 63. 2 Caines, 134.

(c) 2 Caines. 134. id. 136, per Kent, Ch. J. citing *Wool & Bevil*.

(d) 14 John. 431, 2.

(e) Vid. authorities in the three last notes.

(f) id. & vid. Tidd, 91. & cases there cited.

(g) Dalton's Sheriff, ch. 41.

(h) I N. R. L. 396, s. 15.



cute the same, without fee or reward. This deputation may be to execute any process, which a justice is authorized to issue, by the twenty-five dollar act, or fifty dollar act, as a summons, warrant, attachment, execution, &c. with the exception of a venire ;(i) and the party himself may, it is conceived, be deputed to execute a summons, though not a warrant, attachment or execution.(j)

## FORM OF A DEPUTATION.

SARATOGA COUNTY, ss.

On the request of the within plaintiff, I do adjudge it expedient to depute some proper person, other than a constable, to execute the within process, and *John Denn*. having voluntarily undertaken to execute the same without fee or reward, I do adjudge him to be a proper person for that purpose ; And I do, therefore, hereby depute him, the said *John Denn*. to execute the within process. Dated the 1st day of September, 1820.

*Philip Green*, the within named justice.

FORM OF THE UNDERTAKING, TO BE ENDORSED ON THE PROCESS AND SIGNED BY THE DEPUTY, IN THE PRESENCE OF THE JUSTICE.

At the request of the within named plaintiff, I do hereby undertake to execute the within process, without fee or reward. Dated the 1st day of September, 1820.

*John Denn*.

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(i) id.

(j) 4 John. 486, Cro. Car. 416.

## CHAPTER V.

### OF APPEARANCE.

#### SECTION I.

#### OF THE PLAINTIFF'S NEGLIGENCE TO APPEAR.

IF the plaintiff neglect to appear, at the time and place when and where his process of summons or attachment is returnable, or if the defendant appears, and the plaintiff does not, or if neither party appear, the cause is discontinued and out of court ;(k) for, in such case, it cannot be adjourned. It is not to be understood by this, however, that the precise hour of the day is to be rigorously adhered to. This would violate all the rules of doing business, in the like cases. A reasonable time may be given by the justice, beyond the precise hour mentioned in the process, for either party to appear ; and I believe it is a very general practice, among gentlemen in the commission, to give at least an hour's time for either party to appear, even where there is no excuse shown for not adhering to the exact hour appointed. On reasonable cause being shown, the time might doubtless be enlarged, to any subsequent hour of the day. (Vid. the concluding remarks of Ld. MANSFIELD in *Williams v. Frith*. Doug. 193.)

We have seen, that, on the return of a warrant, the defendant is actually brought before the justice ;(l) that the constable, in practice also, generally notifies the plaintiff of the arrest. But if this be not done by the constable voluntarily, for which he is allowed fees, I know of no provision in the law, making it the duty of any person to give him this notice.(m)—And indeed, such a provision would some times be absurd and oppressive in its operation, as where the plaintiff is at his residence in a foreign country. The plaintiff should, therefore,

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(k) Vid. 9 John. 140.

(l) Ante, 276.

(m) Ante, 256.

be ready and attending at his peril ; otherwise, after waiting a reasonable time, the justice ought to discharge the defendant. But until this is done, the statute makes it the duty of the constable, to detain his prisoner at his peril ; and should he suffer him to escape, he would be liable for the plaintiff's damages, in an action on the case.<sup>(n)</sup> The time during which the justice ought to wait, to favour the plaintiff in his preparations for trial, (the defendant being in the mean time detained in custody.) must be regulated by the circumstances of each case. In general, upon the plaintiff's having notice of the arrest, if he does not come prepared to try the cause, and will not apply to adjourn, unless he will engage to be ready in a day or two at most, the defendant should be discharged. But this must obviously depend upon a variety of qualifying circumstances, as whether the arrest and notice thereof be in the day or the night time, whether the plaintiff's witnesses be at hand, or several miles off, &c. &c. and the justice must necessarily, in these cases, possess a large and liberal discretion. The warrant, in general, presupposes an intention in the defendant to escape, or danger of the plaintiff's losing his demand in some other way, and its object would, be entirely defeated, in many instances, by denying a reasonable time for the plaintiff to procure proof of his debt. On the other hand, the defendant ought not to be oppressed by one moment's unnecessary delay by the plaintiff.— The practice in criminal cases, on the return of a warrant, where the justice also has a discretion, shows the large circle, by which it is bounded ; and in some extraordinary cases, the detaining a prisoner in custody for examination, more than twenty days, has been holden lawful.<sup>(o)</sup> This, to be sure, is no direct precedent for the exercise of a similar discretion, in a civil cause ; but it shows that the discretion, of which we are speaking, will admit of no definite limit, and must depend upon the particular circumstances calling for its exercise. Besides, the defendant may at any time, get rid of the arrest, by adjourning on security ; and his very inability to do so, will, in nine cases out of ten, show that the plaintiff's danger of loss by his discharge, is not chimerical. I make these remarks, to show that plaintiff's ought, in general, to have a liberal time for preparation. Defendants are frequently very clamorous about being detained, and generally the more so, where they intend to escape, or otherwise cheat the plaintiff out of his debt ; and the justice will be troubled with repeated motions for their discharge ; but such motions ought to be refused until full time is

(n) 1 N. R. L. 389, 4. A.

(o) Vid. authorities cited, 1 Chit-  
ty's Cr. L. 73.

given, not only to notify the plaintiff of the arrest, but also to make his arrangements for trial. After such time has, in the opinion of the justice, upon all the circumstances, expired, if the plaintiff will not move to adjourn, he should discharge the defendant.

The justice can in no case, give judgment in the plaintiff's favour, on the return of a warrant, unless he be present in court by himself or his attorney, &c.(p) The same rule undoubtedly extends to other process.

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SECTION II.

*HOW THE PARTIES ARE TO APPEAR.*

Any one may appear in proper person ; except infants, (q) and corporations aggregate. (r) The former must appear by next friend or guardian : (s) the latter, by attorney appointed under their corporate seal. (t) Idiots must appear in person, (u) but a lunatick of full age, may appear either in person or by attorney ; (v) and the court, on motion of the plaintiff, will appoint an attorney to appear and defend for him. (w) If he be an infant, he must appear by next friend or guardian, the same as an infant, in other cases. (x) A married woman when she appears alone, must appear in person ; but where husband and wife sue or are sued, he may retain an attorney for them both ; (y) and where an infant sues as co-executor with another, the executor of full age, may retain an attorney for both. (z) But where an infant defendant is sued, a guardian must be appointed for him by the justice, before judgment rendered, in all cases, whether he be sued alone or with others, and if this is not done, the judgment will be reversed, not only as to the infant, but such defendants of full age, as were joined with him. (a) If an infant plaintiff appear by attorney, it must be pleaded in abatement, and is not a ground of non-suit at the trial ; and after verdict or judgment in favour of such infant

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(p) 9 John. 140.  
(q) Vid. Tidd, 69, 70, & cases there cited. 2 John. 192. 8 John. 418.

(r) Tidd. 63. Co. Litt. 66. b.

(s) Tidd, 69, 70, & cases, &c.

(t) id. 63.

(u) id. ante, 146:

(v) Ante, 146.

(w) 13 John. 134.

(x) Ante, 146.

(y) Vid. Dunlap's N. Y. Pract. 86.

(z) 2 Saund. 212, 213. n. 6.

(a) 2 John. 192. 8 id. 418. 11 id. 460. 14 id. 417. 2 Saund. 212. a.



plaintiff, the defect is cured by the statute of amendments and jeofails. (b) It also seems, that in an action against husband and wife, the wife being under age must appear by guardian. (c)

An appearance of some kind, by the plaintiff is essential in all cases, to enable the justice to proceed and give judgment in his favour, even where the defendant confesses judgment. This has been explicitly holden, and, in one case, a judgment by confession, was reversed for the reason, among others, that the plaintiff did not appear in the court before the justice, to receive the confession. (d) And, upon the same principle, no judgment can be rendered in favour of the defendant until he actually appear in some form to demand such judgment. Nor can a judgment be rendered against the defendant, until he appear in proper form, except in two cases; these are upon the return of a summons personally served, or an attachment duly executed, against a defendant having a right by law to appear in proper person, or by attorney. (e) — If the defendant have not this right, a judgment rendered against him, even upon his default, on summons or attachment, will be reversed on *certiorari*. Thus, should a justice render judgment against an infant defendant on his default, upon the return of a summons personally served, or an attachment executed against him, without first appointing him a guardian to appear and defend, the judgment is erroneous. (f) Even a written confession of a judgment by a defendant, is irregular, unless he regularly appear in court before the justice, to make the same. (g)

## SECTION III.

## OF APPEARANCE BY ATTORNEY.

All persons of full age may, if they choose, appear in this court by attorney, except married women and idiots. (h) And all persons are capable of being attorneys in this court, as well as to transact any other, the private business of their princi-

(b) 1 N. R. L. 119. 7 John.  
373.

(c) 2 Lev. 28.

(d) 9 John. 140.

(e) 1 N. R. L. 388, s. 2. id. 399,  
s. 23.

(f) Vid. cases cited last note  
(a)

(g) 6 John. 126, 7.

(h) Vid. Bac. Abr. tit. attorney.  
(B)

pal. It is, therefore, no objection, that the person authorized to manage a cause in this court as attorney, or, in general, to transact any other business for the principal, is an infant, married woman, a person outlawed, a slave, alien, &c.(i) But there are two exceptions to this rule, created by statute,(j) which enacts "that no justice of the peace, or constable serving the original or jury process, in any cause, shall be permitted to appear and *advocate* for either party, in any such cause." But they may appear as attorney, and merely join issue,(k) and indeed do any act in the course of the cause, except appearing and *advocating* at the trial thereof; for the statute refers to an *appearance at the time of the trial*.(l) If they should appear and advocate at the trial the party employing them, could not assign this for error on *certiorari*.(m)

This authority to appear and act as attorney, may, without doubt, be either written or by parol, and a mere verbal request for that purpose, is a sufficient authority to appear and manage the cause, though not to release the interest of a witness.(n) And the attorney is not interested in the cause, so as to prevent his being a witness, and he may, therefore, himself be sworn to prove his right or authority to appear, upon the opposite party objecting that he has no power. And where the power of attorney was in writing, and the attorney named in it, was himself the only subscribing witness to the execution thereof, it was holden, that he was competent to *prove his own authority*.(o) Indeed, we shall see hereafter, that, being the only subscribing witness, he was therefore the *only person* who could have proved such power, while it was within the power of the party to procure his attendance upon the trial;(p) and, if the objection of a want of power be raised by the opposite party, the authority of the attorney to appear, must be proved, the same as any other fact in the course of the trial; and the mere production of a written power, unless its execution is admitted, or the formal proof thereof, waived by the party having a right to object to its sufficiency, will not be enough, without proving its due execution, in the ordinary mode of proving other written instruments, which we shall consider when we come to speak of evidence.(q)

With regard to the form of the warrant of attorney, it may be either *general*, to prosecute or defend all actions, or *particular*, to prosecute or defend a single action or actions, mentioned therein.

(i) id. tit. attorney.

(j) 1 N. R. L. 399, p. 27.

(k) 9 John. 354.

(l) 9 id. 352, 3.

(m) 5 id. 353.

(n) 11 id. 464.

(o) 15 id. 246.

(p) Vid. Post, evidence.

(q) 14 John. 369, 70.

## FORM OF A WARRANT OF ATTORNEY, TO PROSECUTE A SINGLE ACTION.

I DO HEREBY APPOINT *John Stiles*, my attorney, to commence and prosecute in my name and behalf, an action of trespass on the case against *Richard Roe*, before *Philip Green*, Esq. one of the justices of the peace of the county of Saratoga, or to prosecute any such action already commenced and depending before the said justice ; and, in his discretion, to do, execute, suffer, and receive, all acts, deeds, and things, in my name, touching, or any ways relating to the conducting and prosecution thereof, to judgment, execution and final collection, or discharge, which I might or could do, execute, suffer, or receive, in my proper person, and to settle or compound such action. Witness my hand and seal, the 1st day of September, A. D. 1820.

*James Jackson*, (L. S.)

SEALED AND DELIVERED,

IN PRESENCE OF

*John Stiles*,

## FORM OF A WARRANT OF ATTORNEY TO DEFEND A PARTICULAR ACTION.

I DO HEREBY APPOINT *John Stiles*, my attorney, to defend, in my name and behalf, an action of trespass on the case, to be commenced against me by *James Jackson*, before *Philip Green*, Esq. one of the justices of the peace of the county of Saratoga, or to defend any such action already commenced and depending before the said justice ; and, in his discretion, to do, execute, suffer, and receive all acts, deeds and things, in my name, touching the defence thereof, or in any ways relating thereto, or touching, or in any ways relating to the collection or discharging of any judgment which may therein be rendered in my favour, or for the compounding and discharging such action, which I might or could do, execute, suffer or receive in my proper person. Witness my hand and seal, the first day of September, A. D. 1820.

*Richard Roe*, (L. S.)

SEALED AND DELIVERED,

IN PRESENCE OF

*John Stiles*,

The above warrants of attorney may be framed so as to authorize the prosecution, or defence of any number of actions, either commenced, or to be commenced ; or the warrant of attorney may be drawn in the following general forms. The power will then answer the same purposes as the above, and be much more extensive in its operation should this become necessary. It is advisable to adopt the following forms, therefore, in all these cases, not merely on account of their greater brev-

ity, but because their general language will save the danger of a mistake in particulars, as to the nature of the action, the justice, parties, &c. which would render the preceding warrants altogether inoperative.

FORM OF A GENERAL WARRANT TO PROSECUTE.

I DO HEREBY APPOINT *John Stiles*, my attorney, for me and in my name, to prosecute any action or actions to be commenced by him, or now depending, before any justice of the peace of the state of New-York, against any person or persons whatsoever, in my favour, either severally or jointly with any other person or persons; and in his discretion to do, execute, suffer and receive all acts, deeds and things, which he shall deem necessary for the effectual prosecution thereof to judgment, execution and final collection, or discharge, which I might or could do, execute, suffer or receive, in my proper person, and also, in his discretion, to settle, or compound, any such action or actions. Witness my hand and seal, the 1st day of September, A. D. 1820.

*James Jackson*, (L. S.)

SEALED AND DELIVERED,

IN PRESENCE OF

*John Stiles*.

FORM OF A GENERAL WARRANT TO DEFEND.

I DO HEREBY APPOINT *John Stiles*, my attorney, for me and in my name, to defend any action or actions, to be commenced, or now depending, against me, either severally or jointly with any other person or persons, by, or in the behalf of any person or persons whatsoever, before any justice of the peace in the state of New-York; and in his discretion, to do, execute, suffer, and receive all acts, deeds and things, which he shall deem necessary, for the effectual defence thereof, and the collection or discharge of any judgment or judgments, which may be therein rendered in my favour, which I might or could do, execute, suffer, or receive, in proper person, and also, in his discretion, to settle or compound any such action or actions. Witness my hand and seal, the first day of September. A. D. 1820.

*Richard Roe*, (L. S.)

SEALED AND DELIVERED,

IN PRESENCE OF

*John Stiles*.

For the convenience of proving these warrants, let them be witnessed by the attorney himself. (r) The above forms, au-



thorizing the attorney to do any act, &c. touching the prosecution, or defence of the cause, confer a power which it, many times, becomes necessary to exercise, in the course of a prosecution or defence, and which, we have seen, cannot be exercised, under a mere *parol power*, to appear and conduct the suit ;(s) I mean the power of releasing, or receiving a release from a witness, who is objected to for interest, and whose competency the party might wish to restore by release.(t) The form of this release will be given when we come to the head of evidence. Where the attorney executes it, he should do this by affixing the name and seal of his principal, and it should be drawn in the name of his principle ; and where he receives it, the release should be drawn to his principal by name.(u) In both instances it should be signed and sealed.

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SECTION IV.

OF APPEARANCE BY NEXT FRIEND OR GUARDIAN.

An infant under the age of twenty-one years, except where he is co-executor plaintiff with others,(v) cannot appear either in person(w) or by attorney ;(x) but if plaintiff, he must appear by guardian, or by his next friend, (usually called *prochein amy*) or, if defendant, he must appear by guardian. This next friend, or guardian, must be appointed by the court, and if judgment go against an infant, without such appointment, it is in all cases error, (with the above exception of co-executors,) and the judgment will, as we have seen,(y) be reversed, on *certiorari*, from this single cause. Any person, of full age, who will undertake the infant's cause, may be appointed his *prochein amy*, or guardian. But as the *prochein amy*, or guardian for plaintiff, is liable for the costs recovered against the plaintiff, the justice ought to be satisfied that he is capable of binding himself, and is moreover able to pay such costs ; for an infant plaintiff is not liable for costs.(z) But this is otherwise, with a guardian for the defendant. He is not liable for costs, or any part of the judgment recovered against his ward. The infant himself is liable for these.(a) And so would an infant plaintiff be liable, on the

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(s) Ante, 292.

(t) 11 John. 464.

(u) 6 id. 94. Ante, 43.

(v) 2 Saund. 212, 213. n. 6.

(w) 9 John. 159.

(x) 2 id. 192.

(y) Ante, 290.

(z) Cro. Eliz. 33. 1 Str. 548. 2 Str. 798.

(a) Dyer, 104. 1 Bulst. 189. 2 Str. 417.

same principle, upon a judgment against him on a set off, for a sum of money besides costs. We have said that the *prochein amy*, &c. is liable for costs. But how is the defendant to collect them of him? This cannot be done by execution, for the *prochein amy*, &c. is not a party. In the Supreme Court, or Common Pleas, it is done in default of his paying the costs on demand, by committing him on an attachment, as for a contempt; (b) and I believe this is the only mode of proceeding against the *prochein amy*, &c. himself. The mere assent of the *prochein amy*, &c. to become so on the infant's petition, and his consequent appointment by the court, does not, *in terms*, operate as a contract to pay costs to the defendant, so as to authorize a suit for the costs, in this point of view; and I know of no power which the justice has, to treat their non-payment as a contempt, to issue his process of attachment accordingly, and commit for a refusal to pay. And, until his power, in this particular, is better ascertained and understood, than it now is, it would certainly not be advisable thus to proceed. But, I find that our courts will, not only require a *prochein amy*, or guardian for an infant plaintiff, but that, on motion of the defendant, they will compel such *prochein amy*, &c. to give security to pay the costs to the defendant. (c) I should therefore advise, especially if the defendant insist upon it, that before the justice proceed to an issue with the cause, he require the *prochein amy* or guardian to sign, in addition to the usual assent to receive the appointment, a promise, or covenant, or other security, to the defendant, obligating himself to stand accountable to the defendant for such costs as shall be recovered by him against the plaintiff. Upon such a contract the defendant would have a remedy by suit. I have accordingly added such a clause, in the form which I have given of an assent, by a *prochein amy*, &c. to an appointment by the court. Should this be refused, the justice might also refuse to proceed, and non suit the plaintiff, but not award costs against him. This, as we have seen, would be error, he being an infant.

I make the above remarks, and shall follow them up in the form of admission which I give, because the power of a justice to appoint a *prochein amy*, or guardian, is settled; (d) and there can be no doubt he has a right, in the execution of this power, to see that the person who volunteers to receive this appointment, is fully and effectually subjected to its incidental liabilities at common law, whatever the rule may be with regard to the infant's liability for costs, and whether judgment may go against him for such costs, or not. Of this there is no question

(b) Vid. Hullock's L. C. 224.

(c) I T. R. 491.

(d) 2 John. 192.

at the common law : the authorities we have cited, speak a language to this point, which precludes all possibility of doubt.(e) Judgment cannot be rendered against an infant plaintiff for costs. But this is the language of the common law only. The 11th section of the twenty-five dollar act,(f) directs a judgment for costs *in all cases*, against the losing party, *without exception*.— This clause has generally, been considered as not yielding to the exceptions of the common law ; and the better opinion, perhaps, is, that, after a *prochein amy*, or guardian appointed for the plaintiff, judgment may go against him for costs. Even at common law, where an infant plaintiff was taken in execution, and committed to gaol for costs, the court refused to grant him summary relief, and held that his only remedy was by writ of error.(g) Executors or administrators are generally not liable for costs upon judgment against them, either at the common law, or under our general statute concerning costs ;(h) but this privilege is not allowed them in a justice's court, whether plaintiffs or defendants.(i) The proceedings in a justice's court are to be regulated entirely by the act conferring its jurisdiction, and where this statute speaks, it can borrow nothing by implication from the common law, or from other statutes ;(j) and the Supreme Court have decided, that, in all suits brought under the *ten pound act*, costs are given of course, where a debt, or damages are recovered.(k) There is, therefore, little doubt, that judgment may go against an infant plaintiff, for costs as well as damages ; and that the defendant may elect, either to collect them of the infant on execution, or pursue the *prochein amy*, when he becomes regularly bound to pay the same, as he might do any other collateral security. The *prochein amy*, or guardian of the plaintiff, is liable to the justice for his fees, to the same extent as a plaintiff would be liable, in ordinary cases,(2 Esp. Rep. 473,) and an action of assumpsit will lie for them.(id.)

If an infant plaintiff appear by attorney or in person, and judgment be for him it is cured by the statute of amendments and jeofails, and the judgment will not be reversed for this reason, as it will when against him.(l) But this is otherwise of an infant defendant. He must have a guardian in all cases, or he may get rid of a judgment in his own favour, upon *certiorari*, if the ceremony of this appointment be omitted.

Upon its being moved in any way before the justice, that a *prochein amy*, or guardian be appointed, the justice may satisfy

(e) Vid. farther Hullock's L. C. 222, 3, 4.

(f) 1 N. R. L. 393.

(g) Str. 1217. 13 East, 6.

(h) 1 N. R. L. 343.

(i) 10 John. 366.

(j) 2 Caines, 134.

(k) 1 John. 317, per Kent, ch. J.

(l) 1 N. R. L. 119. id. 397, s. 17.

7 John. 373.

himself on inspecting the pretended infant, whether he be of full age, or whether he be an infant as is pretended, and if he be satisfied upon view that he be of full age, he may decide this to be the case, and refuse the appointment; and such decision will be conclusive. And though it should turn out that the justice be mistaken, his record will conclude the parties; and the judgment cannot be reversed for this cause, by either party.<sup>(m)</sup> If the plaintiff will not appear by *prochein amy*, or guardian, the justice should nonsuit him, or give judgment against him upon a plea in abatement, but not for costs. The defendant has a right to insist upon a proper appearance, and is not compellable to answer the plaintiff's declaration without one. He is not only entitled to this additional security for his costs, but if this be omitted, should the judgment be against the plaintiff, the defendant could not retain it. Such judgment might be set aside, on *certiorari*, with costs to be paid by the defendant, as we have before seen. For the same reason, the plaintiff has a right to insist, and indeed should insist, for his own safety, upon the appointment of a guardian for an infant defendant. Upon the plaintiff's motion, therefore, the justice should order the defendant to appear with his guardian, and have him duly appointed forthwith, and unless he do so, the justice may appoint any other person for him, who will undertake the trust, to be named by himself or the plaintiff.<sup>(n)</sup> The same course should be pursued where the defendant makes default upon a summons or attachment, i. e. the plaintiff must himself in such case see that some person is appointed guardian, and the justice ought, in these cases, to appoint the nominee of the plaintiff, unless he have some one better at hand, who will undertake it.<sup>(o)</sup> If the defendant have not appeared at all, of course, no notice to him to appoint a guardian is necessary. The *prochein amy* should be appointed, before the plaintiff declares, or the defendant is not bound to plead; and, in like manner, the defendant's guardian should be admitted before plea, and if the defendant appear in person or by attorney, the plaintiff should object to such appearance, and proceed to have a guardian appointed as above directed.<sup>(p)</sup>

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(m) 3 John. 437.

(o) id.

(n) Barnes, 418, & vid. id. 413.

(p) id.

2 Skund 117 f. n. (1) Str. 1076.

2 Wils. 50. 7 Taunt. 488.



## SECTION V.

HOW A PROCHEIN AMY, OR GUARDIAN FOR PLAINTIFF  
IS TO BE APPOINTED.

When an infant wishes to commence a suit, the justice is to issue the process applied for, in the same manner as if the plaintiff were of full age. But, on his appearing in court at the return, he should mention to the justice, that he wishes some person present, naming him, to act as his next friend or guardian in his behalf. The *prochein amy*, or guardian, should then sign the proper agreement, upon which the justice minutes his appointment in his docket.

Though the names of *guardian* and *prochein amy* are often used indiscriminately, and an infant may sue either by one or the other, yet in practice an infant plaintiff generally sues by his *prochein amy*; but an infant defendant must, in all cases, appear and defend by his guardian. Co. Litt. 135, b. 2, Inst. 261. 2 Str. 784. In the forms, I have supposed the plaintiff to appear by *prochein amy*.

The person appearing, either for the plaintiff or defendant, must be appointed for that particular purpose, by the magistrate; and a parent, guardian in *socage*, guardian by testament, or a general guardian appointed by the Chancellor or Surrogate, have no more right than any other person to appear and prosecute, or defend for the infant until received and empowered by the justice in due form. But they ought, without doubt, in general, to be received and appointed in preference to others, provided they are willing to serve, and have no interest adverse to that of the infant. In some instances, however, this would be highly improper, for it is often the case that an infant sues his own guardian, while yet under age. In such case, or where the guardian's interest is adverse to that of the infant, he ought not to be appointed, or suffered to intermeddle at all in the affair depending. If it turn out in the course of the trial, that the *prochein amy*, or guardian for the plaintiff, is a material witness in his favour, the justice may discharge him, on some competent person taking his place and entering into the same engagement; and this he ought to do, in order to restore the competency of the witness. (q) The defendant's guardian may, of course, be a

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(q) 1 Ves. junr. 142. 6 id. 145.  
12 id. 493.

witness for him, without a discharge, for he is not liable even for costs, and, therefore, has no possible interest.

FORM OF AGREEMENT TO BE PROCHEIN AMY. (r)

JUSTICE'S COURT.

<i>James Jackson,</i>	} Before <i>Philip Green</i> , Esq. justice of the peace.
v.	
<i>Richard Roe.</i>	

SARATOGA COUNTY, ss.

I do accept and agree to be next friend of *James Jackson*, the plaintiff, an infant, under the age of 21 years, to prosecute this action for him according to his desire and at his request.— And farther, I do hereby covenant with the defendant above named, to pay him such costs as he shall recover against the plaintiff above named, by judgment in the above cause: For value received. Witness my hand and seal, the 12th day of September, A. D. 1820.

*John Stiles*, (L. S.)

SEALED AND DELIVERED,

IN PRESENCE OF

*James Denn.*

Should the above *covenant clause* be omitted, still the appointment would be valid for the purpose of preventing all error in the proceedings; and it is, of course, a matter of discretion, at least, in the justice, whether he will require such covenant. If this be not inserted, there is no need of a seal. This is added to prevent disputes about the consideration of the agreement, should a suit become necessary upon it. For the same reason, the courts of common law require a bond, where security is given for costs. A subscribing witness is not absolutely necessary, whether the covenant clause be inserted, or not, as we shall see when we come to speak of evidence; for the execution of a sealed instrument, as well as any other, may be established by evidence of hand writing, or of some person who saw it, though he do not become a subscribing witness. I have supposed that the justice *has a right* to insist on the covenant clause, from what was said by *Buller, J.* in *Doe v. Alston*, 1 T. R. 491. It would seem from that case, that the justice has even a right to require surety of the *prochein amy*, that the defendant's costs will be paid.

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(r) Vid. Pennington on small causes, 204.

SECTION VI.

HOW TO APPOINT A GUARDIAN FOR THE DEFENDANT.<sup>(s)</sup>

If the defendant select a guardian, he appears before the justice on the return of the process, mentions his choice to the justice, and his nominee is then to sign an agreement in the following form :

FORM OF AGREEMENT TO BE GUARDIAN FOR DEFENDANT.

JUSTICE'S COURT.

*Richard Roe,*  
ads. } Before *Philip Green*, Esq. justice of the peace.  
*James Jackson.* }

SARATOGA COUNTY, ss.

I do accept and agree to be guardian of *Richard Roe*, the defendant in this cause, an infant, under the age of 21 years, to defend the said action according to his desire, and at his request. Dated the 12th day of September, 1820.

*Daniel Fenn.*

The justice then minutes the appointment in his docket.

If the defendant make no choice of guardian, omit the words in the agreement, "*according to his desire, and at his request.*"

The *prochein amy*, or guardian for the purpose of prosecuting or defending a cause, hath no power to release a witness, in order to render him competent.<sup>(t)</sup>

For the import of the above abbreviations, *vs.* and *ads. vid. ante*, p. 258 note, (9)

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<sup>(s)</sup> Vid. Pennington on small causes, 204. <sup>(t)</sup> 2 Starkie's Rep. 41.

## CHAPTER VI.

### OF PLEADING IN A JUSTICE'S COURT.

#### SECTION I.

#### OF PLEADING IN GENERAL, AS APPLICABLE TO THIS COURT.

THE parties having properly appeared, the next subject of consideration is the pleadings in the cause. It is hardly necessary to mention, that, by the pleadings in a suit, is not meant, as by many people it is understood, the arguing or advocating the cause before the court; but the *allegations* of the parties, briefly setting forth the cause of action, on the part of the plaintiff, and the defence, on the part of the defendant, which in the Supreme Court, and courts of Common Pleas, are drawn out with great exactness and perspicuity, beginning with the declaration, on the part of the plaintiff, followed by the plea of the defendant, the replication of the plaintiff, the rejoinder of the defendant, and so on to a surrejoinder, rebutter, and surrebutter, until an issue is taken, that is, a material fact is affirmed on one side, and denied on the other, which fact the jury is called in to try, by which means certainty is attained, and abundance of useless litigation shut out of the controversy. (u)

There can be no legal objection to this mode of proceeding in justice's courts, in case the parties prefer it. But as the suitors of the court, and indeed the justices themselves, are presumed in a large majority of cases, to be plain people, unacquainted with legal learning, pursuing a right in matters of so small concern, as not to afford the aid of professional men, the proceedings of these courts are calculated on a plan of simplicity, at least so much so, as to dispense with that legal formality, which would render professional abilities necessary, in making out the demand on one side, or the defence on the other. (v) — And hence, under the hand of our Supreme Court, the tribunal where the judgments, in the court of which we are treating,

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(u) Pennington on small causes,  
129.

(v) id:



could, till lately, alone be reviewed, a system of pleading has grown up, and been established in relation to the latter, which, although corresponding in its great and substantial outlines, with that of the common law counts, would look, in the eye of a lawyer, like the being of another species, from the total absence of form, and, in many instances, of the semblance of form. Justice's courts are not courts of record, and do not proceed according to the course of the common law ;(w) and so far as their powers are concerned, they are confined strictly to the authority given them by the statute : they can take nothing by implication, but must show the power, which they exercise, expressly given them in every instance.(x) The Supreme Court will, moreover, require their compliance with the forms prescribed by the statute ; and if they have been departed from, and are not waived or cured by the statute of jeofails, the proceedings cannot be supported.(y) These proceedings, however, so far forth as regularity and form are in question, will be reviewed with liberality ; and, in the pleadings, technical nicety or legal precision is not required ; but it will be sufficient, if there appear a good ground of action, within the justice's jurisdiction, and that the merits of the cause have been fairly tried.(z)

This total disregard of form, is, however, when the pleadings come up for review before the Supreme Court on *certiorari* where *no objection* was made to their form or substance in the court below. Where this is the case, almost any thing will serve the description of pleadings, provided it appears, to the Supreme Court, that the merits have been fairly tried. But greater accuracy of pleading may be insisted on by the parties, while in the court below ; and not only a lack of substance, but even of form may be objected to, as we shall see hereafter, by *demurrer*, which it would be error for the justice to disregard. Thus, a defendant may *demur specially* to a declaration for not stating the *day*,(a) on which the cause of action arose, and so, I presume, for omitting to alledge the county within which it arose, though both are mere formal objections. Should the party defendant plead to such a declaration, it would be a waiver of the objection as to form, and so would an answer over to any other pleadings. After an issue of *fact* joined, in a justice's court the only question which can afterwards arise upon the pleadings in the same court, and before its removal by *cer-*

(w) 1 John. cas. 20. 3 John. 429.

(x) Vid. 1 John. cas. 20. S. C. 1 Caines, Rep. 594. n. (a) 1 John cas. 229. 1 Caines, 190.

(y) 3 Caines, 152, 3. 2 id. 134.

(z) Vid. 1 John. cas. 20. 1 Caines 594. n. (a) 3 id. 152. id. 174. id. 187. 3 John. 436. 10 id. 104. id. 240.

(a) 14 John. 369.

*tiorari* or appeal is, whether the proofs exhibited in the course of the trial, are warranted by the pleadings interposed by the parties. This objection must always be made in the court below, or it will not be available on *certiorari*; (b) but where no objection is made to the *form* or *substance* of the pleadings, or a *variance* between them, and the proofs offered or received, every necessary averment, which is omitted in the pleadings, will be intended to have been supplied by proof, unless the contrary expressly appear upon the justice's return, and every *variance* will be intended to have been waived. (c)

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SECTION II.

OF THE PROPER PARTIES TO THE ACTION: AND

First. OF THE PARTIES IN AN ACTION ON CONTRACT.

*Who must be plaintiff in an action on contract.*

1. Every action on contract, must be brought and carried on, in the name of the person to whom the engagement violated was originally made, unless it is transferrable, as in the case of a *gaol bond* or *promissory note*, &c. in which case, where the contract is assigned or transferred, it may be brought in the name of the assignee, indorsee, &c. (d) and the indorsee of a note, negotiable by the law of this state, may sue upon it, though it were made in a state where it was not negotiable by law. (e) — A mere agent or attorney, cannot maintain an action in his own name, though the engagement be made to him *as* the agent or attorney of another; but he should, in all cases, sue in the name of his principal. (f) Nor can an unincorporated company sue in the name of their trustees; (g) but an action to recover back a bet upon a horse race, is properly brought in the name of the one who made the bet, though he acted as the agent or depository of others. (h) Where a contract is made with the overseers of the poor, the action must be brought in their own name for a violation of it; and they are not for this purpose a corporation, so that their successors are able to maintain an action in their own names. (i)

(b) 3 id. 436.

(c) 1 John. 276. 2 id. 210. 3 id. 436.

(d) 1 Chitty's pl. 3.

(e) 1 John. cas. 139. 2 Caines, case. Err. 321. S. C.

(f) 10 John. 387. 6 John. 94.

10 John. 396.

(g) 12 id. 401.

(h) 13 id. 88.

(i) id. 496.

2. When the sum of money or damages are due to several persons jointly, they must all be named as plaintiffs in the process and declaration ;(j) and if too many or too few be made plaintiffs, the action will fail at any stage of the proceedings, on objection duly made.(k)

3. But if one or more of such joint claimants should die, the action must be brought in the name of those who survive.(l)

4. If the person who is alone entitled to the claim die, his executor or administrator must sue for it.(m)

5. Executors or administrators must all join, and cannot sue separately ;(n) but any defect of parties, on this account, would be waived, if not pleaded in abatement.(o)

6. The assignee, or assignees of an insolvent debtor, can *alone* sue upon his contracts ;(p) but they may proceed to judgment and execution, in the insolvent's own name, where the suit was commenced before the assignment ; and where the insolvent has, before his assignees became entitled, sold the beneficial interest in a debt, or *chose* in action, not legally assignable to another, the action must still be brought in the name of the insolvent, even after his discharge.(q)

7. Husband and wife must join, in suing for a claim due to the wife, before marriage ;(r) and it must be expressly alleged or shown, where husband and wife bring a suit jointly, how the wife has an interest, or the judgment will be reversed.(s) A bond given to husband and wife jointly, conditioned for their maintenance, may be sued in their joint names, though executed after their marriage.(t) Husband and wife must join in a suit for the wife's rent accrued before marriage, though it is not so of her rent, which falls due afterwards.(u)

*Who may be defendants in an action on contract.*

1. The action must be brought against the party to the contract, *express* or *implied*, and will not lie against his agent who

(j) 1 H. Bl. 81. 7 T. R. 359.  
360. n. (a)  
(k) 1 Chitty's pl. 7, 8, 9. 16  
John. 34.  
(l) 1 Chitty's pl. 12.  
(m) id.  
(n) id.

(o) 1 Saund. 291. (g)  
(p) 1 Chitty's pl. 17.  
(q) id. 15 to 17.  
(r) id. 17.  
(s) 2 Caines, 221.  
(t) 10 John. 49.  
(u) 15 id. 47.

made the contract, unless it turn out, that he had no authority ; and then he may be sued upon it, as his own contract.(v)

2. One partner, *as such*, cannot sue another in a justice's court, for this court has no jurisdiction of an action of account. (w) which will alone lie in such case ;(x) but if there be a balance struck between the partners on settlement, and an express promise to pay, an action of assumpsit lies, *as for a balance struck*.(y)

3. When the claim is against more than one, all should be made defendants, unless they engage *jointly* and *severally*, in which case, all or either may be sued, on which subject more at large, vid. ante, 129 to 132. If there be a number of persons named as contractors, it will be deemed, in the law, a *joint* contract, unless otherwise *expressed*, or clearly appearing to be otherwise intended, from the nature and object of its provisions. But though it be a joint contract, and the claim upon it be consequently against more than one, yet the omission to sue all the persons liable, can be taken advantage of by a plea in abatement only.(z) And where a joint contract is executed by several persons, and one of them is charged in the declaration, as having executed it alone, it cannot be objected as a variance upon the trial, but only by plea in abatement.(a)

4. If too many persons be made defendants, it is a fatal objection, at any stage of the proceedings, whenever the fact comes out in evidence or otherwise is made to appear, and the action must in such case fail against all.(b) But the case of husband and wife, seems to be an exception, and where they are sued jointly for a claim against the husband alone, the plaintiff may, at any time before judgment rendered, enter a *nolle prosequi*, against the wife, and proceed to judgment against the husband.(c)

5. Where several persons are jointly liable, and one or more die, the action must be brought against the survivor or survivors.(d)

6. For a debt due from a single woman, before marriage, the husband is liable, and must be joined with the wife, in an action

(v) 1 Chitty's pl. 23 & 4. Ante, 46.

(w) 18 John. 131. Ante 49, 50.

(x) id. & vid. Willes, 208. Ante, 49, 50.

(y) Ante, 49, 50.

(z) 1 Chitty's pl. 29.

(a) 1 Barnwell & Alderson, 224.

(b) 1 Chitty's pl. 31, 2, 3. 2 John. 213.

(c) 15 John. 433.

(d) 1 Chitty's pl. 37, 8. 2 Mass. Rep. 572.



against him ; (e) but if the wife survive, she may be sued therefor alone. (f) So rigid is the rule requiring the wife to be joined in an action against the husband, for her debt, that omitting to do this is error, for which the judgment will be reversed, although it be not pleaded in abatement ; and, although the husband make an express promise to pay the debt himself, it is without consideration and void, and the wife must, notwithstanding, be joined with him as a defendant in the suit. (g) But husband and wife cannot be sued on their joint promise, made during *coverture*. (h)

## SECONDLY. OF THE PARTIES, IN ACTION FOR A WRONG.

### *Who may be plaintiffs, in an action for a wrong.*

1. The action for a *tort*, or wrong, must, in general, be brought in the name of the one whose legal interest is affected thereby. This rule has been sufficiently considered and exemplified under the heads of *trover*, *trespass on the case*, properly so called, and *trespass concerning lands and goods*.

2. When two or more persons have a right to any property, wrongfully injured or converted, whether such right be as joint tenants or tenants in common, the action for such wrong, should be brought in both or all their names jointly. (i) But the omission to join all the proprietors, can only be pleaded in abatement, and cannot be objected at the trial, as in case of an action upon contract. (j) If, therefore, a plea in abatement of the joint ownership, &c. be not interposed, the plaintiff, who sues, may recover his aliquot share of the damage done, according to his right in the subject of the injury, whether such injury be to the plaintiff's real or personal property. (k) Where the undivided interest of the plaintiff, in a chattel is converted, for instance, three fourths of a ship, and the rights of his co-proprietor are not interfered with, he may, in such case, bring his action of *trover*, and declare for his share of the article converted, stating it, and recover its value. In this last case, the omission could not even be objected to by plea in abatement. (l)

(e) 1 Chitty's pl. 42, 3.

(f) id. 44.

(g) 7 T. R. 348. 8 John. 149, 15 id. 403.

(h) 16 John. 221.

(i) 1 Chitty's pl. 51. 13 John. 286. 14 id. 13. 15 id. 479.

(j) 1 John. 471. 6 id. 108. 8 John. 151.

(k) id.

(l) 4 Campb. Rep. 272. Ante, 164.

3. If too many be made plaintiffs, the objection is fatal to the action, at whatever stage it be made, before the cause is finally submitted.(m)

4. If one of several persons, jointly entitled to damages, for a wrong, die, the action should be brought in the name of the survivors.(n) But this objection also, I suppose, must be made by plea in abatement, and would not be valid in any other shape.

5. An executor or administrator could in no case, at common law, bring an action for a wrong done, either to the person or property of his testator or intestate, in his life time.—An action of trespass or trover will, however, lie for an injury to, or the conversion of, the personal property of such testator or intestate, in the name of his executor or administrator as plaintiff, though the injury were committed in the life time of such testator or intestate. This is by a particular statute, giving in terms, an action of *trespass only*, to an executor, &c. in such case.(o) But the construction given to the provisions of this statute, has been very liberal, and its equity is now understood to reach every injury to the personal property of the deceased. Trover, case or debt for an escape, or case for removing goods under execution, without paying the year's rent, &c. &c. are accordingly holden to lie in right of the deceased.(p) In all other cases, however, the action for a wrong dies with the person.(q)

6. For an injury done to the real or personal property of the wife before marriage, the husband and wife must both join.(r) If the wife survive, she must sue alone.(s) This rule is the same, though the interest of the wife in the lands, be only as guardian in socage.(t)

*Who may be defendants in an action for a wrong.*

1. All natural persons are liable for wrongs, even *infants and married women, idiots and lunatics*. These are liable in an action of trespass, trover, or trespass on the case, properly so called, in all the variety of forms in which we have considered them.(u) And even where goods are delivered to an infant,

(m) 3 Bos. & Pull. 150. 2 Saund. 116. n. Cro. Eliz. 473.

(n) 1 Chitty's pl. 55.

(o) 1 N. R. L. 312.

(p) Vid. 1 Chitty's pl. 57, 8.

(q) id. & vid. 2 John. 227.

(r) 1 Chitty's pl. 60.

(s) id. 64.

(t) 5 John. 66.

(u) 1 Chitty's pl. 65, 68.

under a contract of bailment, and he is guilty of a positive wrongful act of conversion, or other injury, and not a mere omission or non-feasance, by which the rights of the owner are diminished, an action of trover will lie against him, though the contract itself were void.(v) Whether overseers of the poor may be sued *in their private capacity*, either for their own official acts, or those of their predecessors? Quere.(w)

2. All persons, who direct, advise, aid, assist or countenance the commission of a wrong, either directly or indirectly, are considered joint wrong doers, and may be sued as principals in the action, and made accountable for the whole damage sustained. Nay, if they even assent to a wrong, which has been committed for their benefit, they are equally liable. This rule is the same with regard to all the wrongs of which we have spoken, under the divisions of trespass and trover, almost without exception.(x) So that it behoves a man, if he will not be a party to, and liable for a wrong, to keep entirely clear thereof, in act, word and deed, as well before, as after the same has been committed. But a prior or subsequent assent to a wrong, will not subject a married woman, an infant,(y) an idiot or lunatick(z) to an action therefor, for their consent would be void. In order to subject these, they must have done some act, either in committing, aiding, assisting or countenancing the commission of the wrong complained of, previous to, or at the time of its commission.(a) A trifling interference is enough to subject the party as a trespasser; as if I indemnify a constable or sheriff, in selling the goods of a stranger on execution, or if I am in company with him, giving him the least countenance in the sale, I am liable as a principal with him, in trespass or trover for the goods.(b) But the mere act of drawing an inventory of the goods, or drawing a notice of a distress wrongfully taken, will not have this effect;(c) and, though an action will lie against a sheriff or constable, for taking the goods of a wrong person in execution, yet it will not lie against the party in whose behalf they are taken, unless he interfere or assent to the levy.(d)

3. A master or principal, is liable for any injury occasioned by the negligence or unskilfulness of his servant or agent, while in the course of his employ; as for carelessly driving a

(v) 6 Cranch, 226.

(w) 15 John. 436.

(x) Vid. Chitty's pl. 67.

(y) id.

(z) Vid. 15 John. 503. 3 Day's

Rep. 90. Ante, 145.

(a) 1 Chitty's pl. 67. id. 65.

(b) id. 67.

(c) id.

(d) id. 68.

carriage against another. So, the party is liable for any irregularity in the proceedings of his attorney in a cause ; as if the defendant's goods should be taken on a judgment or execution, which is afterwards set aside for irregularity. And the party is liable not only for the act of his immediate agent, but for that of his sub-agent, engaged in his employ.(e) But the case is otherwise, if the injury be not committed by the servant or agent, in the course of his employment, or if he wilfully commit the injury.(f)

4. In all actions for wrongs, of whatever description, all or any of the wrong doers, may be sued and proceeded against, jointly or severally ; and even the misjoinder, by mistake, of an innocent person, is not fatal to the action, as it would be in matter of contract, but such innocent defendant may be acquitted, and the action proceed against the others.(g)

5. Husband and wife must be sued jointly, for a wrong committed by the wife, either before or after marriage ; but if the wife be sued alone, she can only plead this in abatement, and cannot otherwise take advantage of it.(h)



### SECTION III.

#### OF THE JOINDER OF ACTIONS.

##### FIRST, OF ONE SUIT FOR DIFFERENT CAUSES, OR INCLUDING DIFFERENT FORMS OF ACTION.

###### *On Contract.*

1. In actions on *simple contract*, the plaintiff may claim upon, and set forth in his declaration, as many different causes of action, on as many different simple contracts, as he pleases, whether *express* or *implied*. Thus, he may declare on a special contract or agreement, not under seal ;—on a bill of exchange ;—on a promissory note ;—on a balance struck ;—on an account for goods sold ;—for work and labour ;—money had and received ;—money paid, laid out and expended ;—or money lent ;—on a warranty ;—or a contract of bailment, &c. &c.—and each

(e) *id.*

(f) *id.* 68, 9, & *vid. ante*, 168.

(g) 1 Chitty's pl. 75, & *vid.* 14

John. 426. *Ante*, 129 to 132, & *vid.* also *ante*, 247.

(h) 1 Chitty's pl. 82.



of these contracts constitute a distinct cause of action, called a *count*; certain classes of which, *only*, as we shall see, can be joined in the same action. In this first case, simple contracts alone can be joined.

2. In *covenant*, the plaintiff may, in the same manner, join in his declaration, counts on as many sealed instruments as he pleases, containing different covenants. In this action, the counts must always set forth a specialty.

3. In *debt*, the plaintiff may join debt on bond, or other specialty, judgment, simple contract, <sup>(i)</sup> &c. &c. So he may join debt and detinue; and, in debt on a penal statute, several claims of several penalties may, in like manner, be joined, for several acts of the same nature, as for stopping a highway. <sup>(j)</sup> But several penalties cannot be joined for selling spiritous liquor, contrary to the provisions of the act for regulating inns and taverns; for a recovery of one penalty is made a bar to all actions, for any preceding offences of the same nature. <sup>(k)</sup>

*For a wrong.*

1. Several trespasses may be joined in the same declaration, as for taking goods, and for injuring other goods of the plaintiff, and for entering and committing trespass on his land or close. <sup>(l)</sup> Trespass may also be joined in the same declaration, with a count for a rescue or pound breach. <sup>(m)</sup>

2. And the plaintiff may also, in a declaration in trespass on the case for a wrong, join a count for trover, deceit, nuisance, breach of trust, and other injuries mentioned under the head of trespass on the case, properly so called, (ante, 166 to 197.) <sup>(n)</sup> Indeed, a count for a deceit upon a sale, and a count in *assumpsit* on a warranty, the deceit or misfeasance being the gist of the action in both counts, may be joined in one declaration, to which the defendant may plead not guilty. <sup>(o)</sup> But a count in deceit, and a money count cannot be joined. <sup>(p)</sup>

In general, *assumpsit*, *covenant*, *debt*, &c. cannot be joined in the same action; nor can trespass and case be so joined.—Thus, it has been holden, that trespass and trover cannot be joined in the same declaration. <sup>(q)</sup>

(i) 13 John. 462. 1 Chitty's pl. 196, 7, 8.

(j) 1 Chitty's pl. 196, 7, 8.

(k) 7 John. 134.

(l) 1 Chitty's pl. 198, 9.

(m) id. 10 John. 240.

(n) 1 Chitty's pl. 198, 9.

(o) 2 Gaines, 216.

(p) 1 John. 503.

(q) 16 John. 146.

A count on a cause of action arising since the death of the testator, cannot be joined, with a count on a cause of action arising before, even though the declaration state the demand which arose after his death, to be due from the defendants, as *executors*.<sup>(r)</sup> But the rule is otherwise, where the executor is plaintiff; for here a count for a claim due to him as *executor*, though it arose since the testator's death, may be joined with one which arose before. (Vide 1 Chitty's pl. 202 to 206.)

#### SECONDLY. OF JOINDER OF ACTIONS IN DIFFERENT RIGHTS.

Where a claim is due to two or more persons jointly, either on contract, or for a wrong, they cannot join it in an action for a claim due to one of them individually; but he must sue separately for it. Nor can an action be brought against two or more, and a claim against one of them be joined in the same action against them jointly. Nor can a man join a claim due to him as executor, or assignee of an insolvent, with one due to him in his own right. But a sole surviving creditor may join his surviving claim with one due to him individually. And where I owe a claim as a surviving debtor, I may be sued for this, and also a claim due from me alone, in the same suit. A claim due to husband and wife, cannot be joined with a debt due to the husband alone; but this rule does not extend to a debt which falls due to the wife after the intermarriage, for this is, in law, due to the husband directly, and he may sue in his own name, with the right to join a count for his individual claim. The same doctrine holds with regard to a debt due from the husband, which cannot be joined in an action for another debt or demand due from both husband and wife. The above rules in regard to the joinder of actions in different rights, are universal in their application, extending to all actions arising either from wrongs or contracts.<sup>(s)</sup>

#### THIRDLY. OF THE CONSEQUENCES OF MISJOINDER, WHETHER OF ACTION OR PERSON.

The declaration may be objected to by general demurrer, in the case of a misjoinder of action. In this case, however, the court may allow the plaintiff to amend, by striking out a count or counts in his declaration, so as to leave all the remaining matter within the compass of a single form of action.<sup>(t)</sup> But there is no remedy for a misjoinder of parties, if the objection be seasonably made, and, in some instances, a misjoinder of parties will be fatal even on *certiorari*.<sup>(u)</sup> We have, for the most part,

<sup>(r)</sup> 12 John. 349.

<sup>(s)</sup> Vid. 1 Chitty's pl. 200 & 201.

Vid. also the last note <sup>(r)</sup>

<sup>(t)</sup> 1 Chitty's pl. 206, 7.

<sup>(u)</sup> 2 Gaines, 231.

seen, as we have passed along, where the misjoinder of parties is matter of substance, and where it must be pleaded in abatement.

In a court of record a misjoinder of action, as if a count for trespass and trover be inserted in the same declaration, would be fatal, even on error, though not objected to by demurrer or otherwise.<sup>(v)</sup> But, in a justice's court, the better opinion seems to be, that if no objection be made to such a misjoinder, the Supreme Court on *certiorari* will presume that the defendant consented to it, and the exception will, therefore, avail nothing on *certiorari*. Thus, if trover and assumpsit are joined in the court below, the objection must be made there by demurrer, or it will not afterwards be heard on error.<sup>(w)</sup> So where fraud and contract are joined, the defendant must object in the court below.<sup>(x)</sup>



## SECTION IV.

## OF THE ELECTION OF ACTIONS.

This respects, 1. *The nature of the plaintiff's right or interest in the matter, affected.*

2. *The number of parties to the action.*

3. *The number of causes of action, and the joinder thereof in one suit.*

4. *The nature of the defence, and whether it be advisable to compel the defendant to plead specially.*

5. *The evidence to be adduced by the plaintiff or defendant.*

1. An action of trespass for the taking and conversion of goods is preferable to trover, when the plaintiff has a *bare possession*; for, in the former, possession is enough to sustain the action, but in the latter, the defendant may show a present right to the goods in a third person, and thereby defeat the plaintiff's action.<sup>(y)</sup>

(v) 16 John. 146.

(w) 12 id. 347. 3 id. 436.

(x) 3 id. 436.

(y) 13 id. 276. id. 141. 11 id. 529, ante, 158, 227, 8.

2. We have seen that in an action for a wrong, if one who ought to be made co-plaintiff be omitted, it can only be pleaded in abatement ; (z) but it is otherwise of an action on contract, for here it can be objected at any time ; and we have also seen that the joinder of too many defendants, in an action for a wrong, is not fatal, but one or more may be acquitted, and one or more found guilty ; but it is otherwise of an action on contract ; for here, if there be too few named as plaintiffs, it is fatal to the suit, and if a defendant be omitted, it may be pleaded in abatement. Hence, if it be doubtful, as is often the case, how many persons should be either plaintiffs or defendants, it is better to declare in trespass on the case, as for a wrong, when this can be done, than in assumpsit, as upon a contract ; and it is often in the election of the plaintiff to gain this advantage, merely by forming his declaration so as to reach it. Thus, for a breach of trust by a bailee, about the thing bailed, either through carelessness, or any positive injury in abusing or converting it, the plaintiff may state the contract of bailment, and that the defendant in consideration of the delivery, upon the terms of the bailment, whatever they are, promised to fulfil the contract, which he had violated ; which would be declaring in assumpsit ; or the plaintiff might merely state, that the defendant received of him the goods for a certain purpose, which purpose, he had fraudulently, negligently, and wrongfully violated, omitting the forms of setting forth a contract, by not stating either consideration or promise, which would be case. (a) A count in trover may, in the latter instance, be added, with a count, on a fraud in the sale of a chattel, and, as we have seen, even a count in assumpsit, on a warranty, where fraud is the gist of the action. (b)

3. But on the other hand, where I have a claim against another for neglect, &c. as bailee, and also on a note, book account, or other contract, I would shape my declaration against him in assumpsit, so as to bring in, and join in the same action, my several claims upon my other contracts, against the defendant.— But if I had a claim in trover, instead of assumpsit, I would declare in trespass on the case, with which I might also join a count for trover, and thus dispose of both in the same action. (c)

4. And so with regard to a defence, where a defendant has taken my property and wrongfully converted it, I would bring trespass instead of trover, for, in the former, the defendant must plead and set forth his defence specially ; but in the latter action, he can, in most instances, plead the general issue, and give

(z) Ante, 307.

(a) Vid. 3 East, 62. 2 Chitty's  
pl. 270, 71.

(b) id. & vid. ante, 311.

(c) 3 East, 62, 70. Vid. also  
2 Chitty's pl. 270, 1.



his defence in evidence, under it, so that I am precluded from knowing what he will insist on. *(d)*

5. Trespass is sometimes preferable to an action on the case, in respect of the proof by which the action is to be sustained; for should a man run against my carriage in the high way, and do me an injury, if it were mere negligence, I might bring either trespass or case; but if wilful, I have no choice, but must bring trespass. Now, if I should bring case, and the witness should happen to express his belief, that the injury was wilful, I must be turned round to another action, by bringing which, in the first instance, I might have been safe at all events. *(e)*

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## SECTION V.

### OF CERTAIN RULES, WHICH RELATE TO PLEADING IN GENERAL.

Something has been said on this subject, in the introduction to the present chapter, by which it appears that the pleadings, in a justice's court, are to receive the utmost possible construction in favour of their validity. And where either the cause of action, or the defence is stated in plain language, and in words according to their ordinary import in conversation, this will be enough, though the strict rules of special pleading at the common law be violated. *(f)* Indeed, it is said, (and with the greatest propriety) that special pleading in a justice's court is to be discountenanced, that it is calculated to mislead magistrates, and involve the proceedings of their courts in all the technical niceties of a Court of Record. *(g)* Whenever, therefore, the Supreme Court can possibly intend, from the proceedings before them, that the merits were fairly tried in the court below, they will not examine or test by technical rules the formality of the pleadings. *(h)* Under these strong intimations of the Supreme Court, I confess it has frequently been a matter of surprise to me, and the more so on considering the nice and intricate nature of special pleading, that the legislature should still leave the defence in a justice's court, to be conducted by rules which have, in their application, so often embarrassed the greatest lawyers, and the ablest judges on the bench of the common law courts. "If," as an able writer on this subject observes, "a

*(d)* 1 Chitty's pl. 212. 11 John.  
132.

*(e)* 14 John. 432. 3 East, 600.

*(f)* 3 Caines, 152.

*(g)* id. 3 Caines, 275 to 278.

*(h)* 3 id. 171

"navigation often difficult in itself, and always made dangerous by bad pilots, has made many wish that the course of the voyage was entirely changed,"<sup>(i)</sup> though directed by the learning and experience of the English bar, would it not be a prudent and necessary means of safety, in a justice's court, to shorten the whole process at once, by authorizing a full defence in almost all cases, under the general issue? True, such a provision ought not to be without its exceptions. Matters in abatement, which do not go to the merits of the action, a set off, which is in the nature of a cross action, or a plea of title to lands in an action of trespass, which goes with the cause to another tribunal, &c. should, without doubt, remain to be introduced as at present. I find that I am not speaking without the authority of precedent. In Massachusetts, the legislature have gone far towards abolishing all special pleading on the part of the defendant, in a justice's court, by giving a much greater latitude of defence under the general issue, than has yet, I believe, been allowed to any Court of Record.<sup>(j)</sup> In many actions, there is already very few instances, in which it is necessary to plead the defence specially. Take, for example, the actions of trover, assumpsit and case, which derive their popularity, even in the higher courts, from the great ease with which they are stated and defended on the record. Special pleading is, in many instances, mere form. Can any earthly reason be given, for instance, why, in trover, matters of defence may be given in evidence, under the general issue, when, in an action of trespass for the very same injury, the very same defence must be ushered into court, through the delicate process of a special plea, to be met by a replication perhaps equally special, and followed by a rejoinder, rebutter, and surrebutter, all in consequence of a mere difference in the form of the action? But, in treating on this subject, we must take the doctrine as we find it. This doctrine must, in the nature of things, always exist. It must always be studied by those who mean to make themselves, in the least, conversant with actions and defences in courts of justice. The *form alone*, in which it is used in a justice's court, seems to be objectionable.

#### 1. WHAT CIRCUMSTANCES SHOULD BE STATED IN PLEADING.

In general, whatever circumstances are necessary to constitute the cause of complaint, or the ground of defence, must be stated in the pleadings, and all beyond is mere surplusage.—

(i) *Economus*, 79.

(j) Statute of Mass. 1783, ch. 42, s. 7. & *vid.* 4 Mass. Rep. 672.

Facts are to be stated, and not arguments, or inferences, or matters of law. (k) Thus, if I were to sue a constable for suffering a man to escape, on a warrant at my suit, it would not be enough for me in declaring, to state to the justice, *that the defendant is liable for an escape from a warrant in my favour*; for this would be a mere conclusion of law; and, though, on *certiorari*, after issue joined, and the merits fairly tried, the Supreme Court might not reverse the judgment for that reason, (l) yet the defendant might demur to my declaration, and if the justice should overrule the demurrer, it would be error. It is, therefore, strictly necessary for me to state, *that I sued out a warrant before such a magistrate (setting it forth in substance,) which warrant was delivered to the defendant, being a constable of the county, that he arrested the defendant by virtue of such warrant, and suffered him to escape and go at large, to my damage, &c.* And I may be required to set forth the time and place of each of these acts. (m) This time and place are, however, generally, matter of form only, and unless the time be stated, as *the date* or *other part* of an instrument or contract or the place appear upon the face of a writing set forth in pleading, any proper time or place, varying from the one stated in pleading, may be proved upon the trial, and will sustain the declaration or other pleading, as effectually, as though the allegation and proof agreed in terms.

And so in the defence, suppose the constable admits the escape, but has by agreement given the plaintiff his watch to pay him the damages, called in law an *accord and satisfaction*, which is a good defence, but the constable, in pleading this defence, should merely say, *he has settled with the plaintiff*, without showing how. This is nothing more than a conclusion of law, is consequently bad, and the plaintiff might demur to the plea. The defendant should state the facts which constitute his defence viz. *that the plaintiff agreed with him to except a certain watch in satisfaction of his damages, on account of the escape: and that, in pursuance of such agreement, the watch was delivered to, and accepted by the plaintiff, in full satisfaction of such damages, with the time when, and the place where this was done.*

## 2. HOW STATUTES ARE TO BE PLEADED.

*Publick statutes*, that is to say, such as concern the whole state, need not be set forth in pleading; but *private acts*, that is to say, such as relate to a corporation or single individual, must

(k) 1 Chitty's pl. 216, 17.

(m) 14 John. 369.

(l) 3 Caines, 152. 1 John. 276.

2 id. 210. 3 Caines, 275.

be set forth, at least, in substance, the same as a private deed or charter, or the record of a court of justice ; and so of the *by-laws* of a town, village or other corporation. Thus, in declaring for the offence of selling spiritous liquor, without license, the statute, creating such an offence, is a publick one, and need not be set forth, but merely the facts which constitute the offence within the provisions of the act are sufficient, concluding with the words "*contrary to the form of the statute in such case made and provided.*" But in an action for a penalty imposed by the by-law of a town, village or corporation, for instance, *letting the defendant's hogs run at large, contrary to the by-law of a town or village*, the *by-law* itself, either in words or substance, must be set forth as a part of the facts, to make the plaintiff's case. Many acts in the legislature, though, in their nature, private acts, have a clause declaring that they shall be publick acts, &c. in which case they are to be treated as such, both in the pleadings and evidence. (9)

### 3. THE DECLARATION NEED NOT NEGATIVE THE DEFENCE.

Matter of defence to the plaintiff's action, need not be negatived by him in declaring, or any way alluded to, (except the common breach, as non-payment in an action of debt, or non-payment or non-performance of the defendant's promise, in an action of assumpsit, or of his covenant in an action of covenant,) for matter of defence should be left to be pleaded or otherwise, according to its nature, stated and proved on the part of the defendant. For example, the plaintiff, after having stated his claim, need not go on to deny that he has released it, that it is barred by the statute of limitations or other cause, for if there be these, or any other matter, in defeasance of the plaintiff's action, it must be shown by the defendant. (n)

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(9) PUBLICK AND PRIVATE ACTS IN LEGAL LANGUAGE.--I. Acts are deemed to *publick & general acts*, which the judges will take notice of without pleading, viz. acts concerning all great officers, or all officers in general, of any other class, such as sheriffs, &c. Acts concerning trade in general, or any specifick trade ; acts concerning all persons generally, though it be a special or particular thing, such as a statute concerning the Circuit Court, Oyer & Terminer, &c. or woods in forests, chases, &c. &c. 2. Private acts are those which concern only a particular species, thing or person, of which the judges will not take notice without pleading them, viz. acts relating to any particular place, or to divers particular towns, or to one or divers particular counties, or to certain colleges only in the university. In a general act, there may be a private clause, and a private act, if recognized by a publick act, must, afterwards, be noticed by the courts as such. Vid. Bac. Ab. tit. STATUTE. (F) Philadelphia ed.

(n) Vid. 1 Chitty's pl. 228, 9.



In declaring upon statutes, where there is an exception in the enacting clause, the plaintiff must expressly alledge and show the defendant not to be within such exception; but if there be an exception or proviso, in a subsequent part of the statute, the defendant must show it himself by way of defence.<sup>(o)</sup> To make this plain, take the 14th section of the "act to lay a duty on strong liquors, and for regulating inns and taverns."—This section provides, that if any tavern keeper shall take a note to secure more than one dollar and twenty five cents, for strong liquors drank at his house, from any person, other than *travellers*, he shall forfeit a penalty equal to the amount of the note. Now, in an action for the penalty under this act, the plaintiff must not only set forth the facts necessary in the first instance, to maintain his suit, viz. that the defendant was a tavern keeper, and took the note of such a person, for the purpose forbidden by the act, but he must go farther, and deny, in his declaration, that the person who gave such note, was a traveller; for here the exception, *other than travellers*, is contained in the *very clause*, which gives the *penalty*. But, after the act goes through a description of the offence, there is a proviso or exception, *that it shall not extend to the taking a note of a lodger in the tavern keeper's house*, but that this shall be lawful. Now it is not necessary for the plaintiff to deny, that the person trusted, was a lodger, but if this be the fact, the defendant must show it on his part. This is a universal rule applicable to all the other pleadings in a cause, as well as the declaration.<sup>(p)</sup>

#### 4. THE LAW SOMETIMES ALLOWS A FICTION IN PLEADING.

The general rule is, that facts must be stated, yet the law sometimes allows of a fiction in pleading, in order to render it more easy. Thus, in trover, the plaintiff always declares, that he lost the goods in question, and that the defendant found them, which facts the defendant is not allowed to deny; and on the trial, though the plaintiff show that he delivered the goods to the defendant to use, and that he had refused to re-deliver them, after the time of the bailment had expired, or that they came to his hands in any other way, besides that of losing and finding, and are wrongfully converted, he must recover; for the plaintiff, in trover, always declares on a *loss and finding*, and then proves what kind of taking he pleases.<sup>(q)</sup>

#### 5. THE PLEADING MUST NOT BE DOUBLE.

It is also a rule equally affecting declarations, pleas, replications, &c. that the pleading must not be double, that is, that no

<sup>(o)</sup> 1 Chitty's pl. 289.

<sup>(p)</sup> Vid. 3 John. 438. 4 id. 304.

<sup>(q)</sup> 1 Chitty's pl. 229, 30.

single count or plea should contain two or more matters, either of which would, *in itself*, independently of the other, be a sufficient ground of action or defence. Thus, a claim for a trespass on *lands* and *goods*, in an action of trespass, or a claim on a *promissory note*, and for *goods sold* in assumpsit, cannot be huddled together in one count, but should be stated in two distinct counts in the same declaration; for each is a good and sufficient cause of action independent of the other. So a release and payment, cannot be pleaded in the same plea, but should be stated in two distinct pleas, and so of a thousand cases which might be supposed. But this *duplicity* in pleading is only matter of form, and will endure, unless objected to by special demurrer.<sup>(r)</sup>



## SECTION VI.

## OF THE MODE OF STATING FACTS.

1. There is no statute, requiring the pleadings in a justice's court, to be in writing, nor is this necessary. But it is certainly advisable, in all cases where the subject of the suit is contested, to reduce the pleadings to writing, and if the opposite side will proceed by *parol*, and his pleading is defective, to take advantage of such defect by demurrer, until it have sufficient substance, legally to require an answer. This course will shut out a good deal of after controversy, about the points in question in the cause, as well as the nature of the action. Some declarations and pleas are so loose, as neither to give a character to the action on the one hand, or to disclose the nature of the defence on the other. This ought not to be tolerated, unless the party entitled to object, is *willing* to put his rights afloat upon such a shoreless ocean, by answering over. If the pleading demurred to be insufficient, the justice should so decide, and in general, suffer the party to amend from time to time, until it is perfect. If the demurrer be not properly taken, he should, upon overruling it, generally suffer the party demurring to answer over. But in the latter case, if the justice decide erroneously against the demurrer, though the party answer over and go to trial, the judgment will, it seems, be reversed for the error, in deciding the demurrer.<sup>(s)</sup> The justice should, therefore, be satisfied, that the demurrer is clearly ill taken, or allow it, and

(r) Vid. 1 Chitty's pl. 230.

(s) 14 John. 370. 3 Caines, 137. 8.

grant the party leave to amend the pleading demurred to.— This course will also improve the certainty of the pleadings before him, which is, in general, a result much to be desired.— Particularity and certainty in the pleadings are of the utmost importance, in many instances, in order to avoid subsequent disputes about what was admitted, what denied, the nature of the action, the character of the defence, and the testimony admissible under the issue on either side, &c. &c. and much controversy is many times avoided, by the justices being jealous, in exacting a due degree of accuracy from the parties, in their allegations. If this be waived, however, he has nothing to do with it. He cannot himself demur. We have seen that the Supreme Court never require the same technical precision and formality in pleadings before a justice, as in that court, and, on review by *certiorari*, they are to determine according to the very right of the case.<sup>(t)</sup> Words as they are understood in ordinary use, are always the proper language of pleading in a justice's court, and they are to be taken in that sense, in which they are understood in common parlance.<sup>(u)</sup> Thus, in declaring on the warranty of a horse, the plaintiff stated that he “*let the defendant have a horse and a note of hand, of sixteen dollars, in consideration whereof the defendant let the plaintiff have a horse, which he warranted to be a sound good working horse, whereas he was totally unfit for all manner of business.*” Now the word LET, in law, would mean a bailment, and not a sale or exchange, as was evidently intended by the plaintiff in this declaration; but the meaning of the word as it is used here, being, in common language, among people, a sale or exchange, the Supreme Court, for this reason, held the declaration sufficient.<sup>(v)</sup>

2. The principal rule as to the mode of stating facts, is, that they must be set forth with *certainty*, by which term is understood a clear and distinct statement of the facts, which constitute the cause of action or ground of defence, so that they may be understood by the party who is to answer them, and by the court or jury who are to try them, and by the court who is to give judgment.<sup>(w)</sup> This rule will be illustrated, when I come to speak of the qualities of declarations, and other parts of pleadings. Let it suffice to state here, that when the facts are not really stated with sufficient certainty, the introduction of the word *certain*, is of no avail. Thus, a declaration for a sum of money, forfeited by a *certain by-law*, without setting it forth, or for a sum of money due on a *certain bond*, without stating

(t) 5 John. 122.  
(u) 3 Caines, 152.

(v) *id.*  
(w) Vid. 1 Chitty's pl. 236.

it, is insufficient ; so for wages, in consideration that the plaintiff would go *a certain voyage*, without stating the voyage. So, where the declaration was, " that the plaintiff had sold to the defendant *a certain horse*, at and for *a certain quantity of certain oil*, to be delivered within *a certain time*, which had elapsed," would be bad on demurrer. And a justification in trespass against a constable, by pleading that he took the property claimed by virtue of *a certain attachment*, or *a certain execution* without setting it forth, would be insufficient. So the words *duly*, *lawfully*, *sufficiently*, &c. without showing the matter of fact, are seldom of any avail in pleading.(x)— But the above defects, in a justice's court, must be taken advantage of by demurrer ; for if judgment be given upon such a declaration in the court below, it would not be reversed, unless it appear that the objection was made there. Thus a declaration, *for the defendant's not fulfilling a contract for a certain lot of lease land, lying in G.* was holden sufficient, in a justice's court, not being demurred to in the court below.(y)

## SECTION VI.

### RULES OF CONSTRUCTION.

On this subject, I think I am warranted in saying, from the reasons and authorities already adduced, that, *contrary* to the rule the common law courts, every thing in a justice's court shall be taken most strongly in favour of the party pleading it, or rather, if the meaning of the words used, be doubtful or equivocal, they shall be construed most strongly in favour of the party using them. The language of pleading, in all courts, is to have a reasonable intendment and construction ; and where a matter is capable of different meanings, that shall be taken which will support the pleading, and not the other, which would defeat it ; and when the meaning either of words or sentences is doubtful, the context may be resorted to, that is, what precedes or follows the ambiguous matter, either in the pleading itself, which is objected to, or any which precede it, in order to give it a consistent or certain meaning. If the sense be clear, nice exceptions ought not to be regarded.(z)

(x) Vid. I Chitty's pl. 240, 241.  
(y) 3 Caines, 219.

(z) I Chitty's pl. 241, 2, 3. 2  
John. Cas. 339.



## SECTION VII.

## DIVISION OF PLEADINGS.

This is into two heads, 1. *Regular*, 2. *Irregular*.

1. *Regular pleadings* are those, which arise in the ordinary course of a suit, and are, 1. The *declaration* or *count*, 2. The *plea*, 3. The *replication*, 4. The *rejoinder*, 5. The *surrejoinder*, 6. The *rebutter*, 7. The *surrebutter*, 8. *Pleas puis darrein continuance*.

2. *Irregular*, are those which are occasioned by the mistakes in pleading on either side, being in a justice's court, but another name for *general* and *special demurrers*.

An example of regular pleading, in which the allegations of the parties, are conducted to a *surrebutter*.

## IN TRESPASS.

## JUSTICE'S COURT.

James Jackson,

v.

Richard Roe.

DECLARATION.

## SARATOGA COUNTY, ss.

The plaintiff complains of the defendant for this, to wit, that on the last day of August, A. D. 1814, he, the defendant, with force and arms, &c. the close of the plaintiff situate in the town of Saratoga Springs, in the said county, did break and enter, and by his servants, horses and cattle, then and there trod down, subverted and destroyed, the grass and other vegetables of the plaintiff, then and there growing; and other wrongs to the plaintiff, then and there did, against the peace of the people of the state of New-York, and to the damage of the plaintiff of \$50.

## PLEA.

The defendant says, that the plaintiff ought not to have or maintain his said action against him, because he says, that the close mentioned in the plaintiff's declaration, is a certain close situate in the said town of Saratoga Springs, called the *pasture*; and that the plaintiff did, at the said time when, &c. to wit, at

the said town of Saratoga Springs, in the said county, give the defendant leave and license to turn and drive his said horses and cattle into the said close of the plaintiff, to be fed and kept there, wherefore the defendant did at the said time, when, &c. by his servants aforesaid, turn and drive his said horses and cattle into the said close, and thereby did tread down, subvert and destroy the grass and other vegetables of the plaintiff, then and there growing, as he lawfully might, for the cause aforesaid, to wit, at the town of Saratoga Springs, in the county aforesaid, which are the same trespasses whereof the plaintiff above complains, wherefore he prays judgment, and that the plaintiff may be barred from having and maintaining his said action thereof against him, the defendant.

## REPLICATION.

The plaintiff says, that he ought not, by reason of any thing in the defendant's said plea alledged, to be barred from having and maintaining his said action thereof, against him, because he says, that the said close, in which, &c. in the said declaration mentioned, at the said time, when, &c. was and is a certain close in the town aforesaid, called the *meadow*, bounded eastwardly on the highway, which said close now is, and at the said time, when, &c. was another and different close, from the said close, in the defendant's said plea mentioned ; wherefore, inasmuch as the defendant has not answered the said trespasses, by him committed, in the said close, in which, &c. above newly assigned, the plaintiff prays judgment, and his damages, on occasion of the committing of the said trespasses above newly assigned, to be adjudged to him, &c.

## REJOINDER.

The defendant says, that the plaintiff ought not, by reason of any thing in his said replication alledged, to have or maintain his said action thereof, against the defendant, because he says, that he was not guilty of the said several supposed trespasses, in the said replication above newly assigned, or of any or either of them, or of any part thereof, in manner and form as the plaintiff hath above thereof complained against the defendant, at any time within *six years*, next before the commencement of this suit, against the defendant, in this behalf ; wherefore he prays judgment, and that the plaintiff may be barred from having and maintaining his said action thereof, against him, the defendant.

## SURREJOINDER.

The plaintiff says, that he ought not, by reason of any thing in the defendant's said rejoinder alledged, to be barred from having and maintaining his said action thereof against the defendant, because he says, that the defendant before, and at the time when the said cause of action, in the said replication new assigned, accrued to the plaintiff, was in parts out of this state, to wit, at *Quebec*, in the province of *Lower Canada*; and that he, the defendant, afterwards, to wit, on the 1st day of August, A. D. 1816, returned from the said parts out of this state, which said return of the defendant was his first return into this state, from the said parts out of this state, after the accruing of the said cause of action, to wit, at the town of *Saratoga Springs*, aforesaid. And the said plaintiff further says, that he commenced this suit against the defendant, in this behalf, within *six years*, after the defendant's first return into this state after the accruing of the said cause of action, to wit, at the town of *Saratoga Springs*, aforesaid, wherefore he prays judgment, and his damages aforesaid to be adjudged to him, &c.

## REBUTTER.

The defendant says, that the plaintiff ought not, by reason of any thing in his said surrejoinder alledged, to have or maintain his said action thereof against the defendant, because, he says, that the plaintiff did not commence this suit against the defendant, in this behalf, within *six years* next after the defendant's first return into this state, after the accruing of the said cause of action unto the plaintiff, in manner and form as the plaintiff hath above in his said surrejoinder, in that behalf alledged.

In a court of record, the defendant would conclude this *rebutter* in these words, "*and of this he puts himself upon the country,*" which *country* means the *jury*, who are to try the cause. Upon this, the plaintiff joins issue by a *surrebutter*, in these words, "*and the said plaintiff doth the like.*"

In a justice's court, as we shall see by and by, the issue is joined, for all the purposes, both of form and substance, the moment the parties arrive at that point in pleading, where a matter is *alledged* on one side, and *denied* on the other. So far as this court is concerned, the *forms* of joining an issue, at the common law, would be both unnecessary and absurd; for the calling of a jury does not follow an issue, *of course*, as at common law, but the issue is referred to a trial by the *justice*, unless a jury is demanded by one of the parties. But of this hereafter.

Our *eighth* division of *regular* pleading was, what is called in the common law courts, *pleas puis darrein continuance*.

Now suppose an issue between the parties to be joined in the above, or any other form, and that the cause is continued by adjournment for decision to any other day, and, before the adjourned day arrives, the parties refer the matter in dispute to arbitrators who make an award, or the plaintiff gives the defendant a release, or receives something of the defendant in satisfaction of his demand, or, indeed, any other matter of defence arises either in bar or abatement, the defendant may then come into court at the adjourned day, and plead such award, release, accord, and satisfaction, or other matter in bar, or in abatement. The title of this plea, in a court of record, signifies a *plea since the last continuance*, because the defendant must always alledge that the matter of defence arose *since the cause was last continued*, in order to have his plea received, for if it arose prior to the commencement of the suit, or to the issue joined, it should have been pleaded in the first instance, and cannot afterwards be received. Matter of defence, thus arising after a cause has been continued, must always be pleaded, if it be a full and entire defence, and not merely in mitigation of damages, and can never be given in evidence, as it may many times be, if it arise earlier, under the general issue.

This plea, in form, prays judgment, whether the plaintiff ought further to have and maintain his action against the defendant, because, since the last continuance of the cause, by adjournment, to wit, on such a day, at, &c. the matter of defence arose, setting it forth, the same as any other plea in bar or abatement, according to its nature.

## 2. AN INSTANCE OF THE SECOND KIND OF PLEADING, CALLED IRREGULAR.

In a justice's court, we have said that this is confined to demurrers. *Demurrers to evidence*, *bills of exceptions*, &c. which, in courts of record, are also classed under this head, (a) are, as we shall see hereafter, inapplicable to this court. In any stage of the above pleadings, if one party is dissatisfied, either with the substance or form of the pleading, which his antagonist exhibits against him, the way to avail himself of this objection is, by a *demurrer* thereto. Instead of answering the pleading, he *demurs*,—that is, he merely states to the justice, in writing or by parol, that the pleading is not sufficient in law for the plaintiff to have or maintain his action against the defendant, if it be a

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(a) Vid. Chitty's pl. 243, 4.



declaration, replication, surrejoinder, or other pleading on the part of the plaintiff. On the other hand, if it be a pleading on the part of the defendant, a plea, rejoinder, rebutter, &c. the plaintiff demurs to it, by stating, *that it is not sufficient in law to bar or preclude him from having or maintaining his action against the defendant.* Thus, if the above declaration should omit to mention *the day* of the trespass being committed, the defendant might demur specially, for this defect in form, <sup>(b)</sup> pointing it out particularly, which we shall hereafter see is always necessary in a demurrer for defect of form, though otherwise of substance, as if the plaintiff had merely stated *a trespass*, without showing in what it consisted. Again, should the above plea merely specify the close in which the trespass was committed. and attempt to justify the trespass by denying *that the plaintiff ever forbid the defendant to turn his horses and cattle into it*, or state other matter which would not operate in law to justify the injury, the plaintiff might demur generally, that is, say the plea is insufficient, &c. generally, without specifying the defect in the demurrer, but content himself with mentioning it on the argument; and so of the subsequent pleadings. When the pleading of a party is demurred to, the manner of joining issue is, for him, if plaintiff, simply to alledge *that it is sufficient in law, for him to have and maintain, &c.* if defendant, *that it is sufficient in law, to bar and preclude the plaintiff from having and maintaining, &c.* which makes what is called an issue in law, which the justice alone is to decide. But more of this hereafter, in its proper place.



## SECTION VIII.

## OF THE DECLARATION.

## FIRST. OF ITS GENERAL REQUISITES.

The declaration is a specification, in a methodical and legal form, of the circumstances, which constitute the plaintiff's cause of action; and its most important requisites are, 1. That it correspond with the process. 2. That it contain a statement of all the facts, necessary in point of law, to sustain the plaintiff's action. 3. That these circumstances be set forth with certainty and truth. (Vide 1 Dunlap's N. Y. pract. 235, 6.)

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(b) 14 John. 369.

1. THE DECLARATION MUST AGREE WITH THE PROCESS, 1. *In the names of the parties*, 2. *In the number*, and 3. *In the character of the parties suing or sued*.

1. If the defendant is sued by a wrong name, he may plead it in abatement, but if he omit to do this, the plaintiff may pursue him to judgment and execution, by whatever name he is sued, although differing entirely from his real one.(c) A misspelling of a name, unless it give a different sound, is not a misnomer,(d) and the omission of the *middle*, or the *initial letter* thereof, commonly called the *middle letter*, as *John Doe*, where the actual name is *John S. Doe*, for instance, is not a legal misnomer, and the omission is immaterial, for the law knows but one christian name.(e) And where the defendant pleads a misnomer in abatement, the plaintiff may avoid it by stating in his replication, and proving, that the defendant is known as well by the name in which he is sued, as the one which he insists upon in his plea.(f) Where the defendant is described in the process thus : *James Jackson*, otherwise called *John Hackley*, called an *alias dictus*, the defendant cannot plead a *misnomer* in abatement for this reason, if the name preceding the *alias dictus* be right. The true name is that which precedes the *alias dictus*.(4 John. Rep. 118.) On the defendant's pleading his own misnomer in abatement, he must always give his real name, and the court may then suffer the plaintiff to amend, by inserting in the process the true name so given, instead of the one by which the defendant is sued.(g) Yet, notwithstanding this liberality of the courts in allowing amendments, and overruling pleas of misnomer, the greatest care ought to be taken in naming the defendant correctly, either in a *warrant* or *attachment*; for it is, beyond all doubt, the settled law of the land, that, unless the defendant's name, inserted in this process, be either his real name, or some name by which he is known and called, the officer executing it will be liable to an action, either of *false imprisonment* (h) or *trespass for taking the defendant's goods*.(i) according to the nature of the process, and this, even though the person arrested, or whose goods are taken, be the person really intended in the proceeding; for this original process is not like an execution against a person. where he has let slip the chance of pleading the misnomer in abatement, in which case we have just

(c) 2 Str. 1218. 3 East, 167. 6 T. R. 215, 6, per Ld. Kenyon, ch. justice.

(d) 3 Caines, 219.

(e) 5 John. 84.

(f) 3 Caines, 219. 5 John. 84.

(g) 3 Maule & Selw. 450, and

vid. several cases there cited by the counsel.

(h) 3 East, 328. id. 329. n. (a) Vid. also 2 Taunt. 399. 2 Campb. 271. 3 Campb. 110. n.

(i) 6 T. R. 234.

seen, that the name with which the suit began may be pursued. I am thus particular upon this topic, in order to caution magistrates against the practice which prevails in some places, of issuing warrants, &c. against strangers, whose names are unknown, by a fictitious name, under the notion that no consequence can follow this, other than a plea in abatement.

If the plaintiff's name in the process be wrong, it seems that the consequences of this error may be avoided by declaring in this way, "*James Jackson*, (the plaintiff's real name) at whose suit, by the name of *John Jackson*, (the wrong name mentioned in the process) *Richard Roe*, (the defendant) was served with process in this cause, complains of *Richard Roe*, &c." thus going on, and declaring in the plaintiff's true name throughout.— This will avoid the objection by plea in abatement, or otherwise, that the plaintiff is misnamed, whereas if the plaintiff's misname be carried into the declaration, it may be pleaded in abatement. (j) If the defendant do not appear, the plaintiff may declare and take judgment, by a name different from the plaintiff's name inserted in the process, *Carner*, instead of *Gardner*, for instance, the identity of the person being ascertained by proof. (k) The defendant, if he mean to take advantage of such a variance, must appear and make the objection, and even then, we have supposed it might be obviated by a particular form of declaring.

2. The declaration is irregular, if it vary from the process in the number of plaintiffs. (l) And so of the defendants, it would seem, in a warrant or attachment, which are in the nature of *bailable process* in a Court of Record. (m) But it has been repeatedly decided by the English Courts of King's Bench and Common Pleas, that the plaintiff may sue out process *not bailable*, that is, on which no arrest is to be made, against any number of defendants jointly, and yet declare against them severally, such process being intended merely to give the defendants notice of the proceedings, and bring them into court, thus making a single process, the foundation of as many suits in favour of the same plaintiff, as there may be defendants named in it. (n) The rule would, without doubt, be the same in relation to a summons, and the practice under it, would be highly convenient and expeditious. It is not unusual for a tradesman, &c. in extensive business, to commence twenty, thirty, or even a greater number of suits, by summons, before a justice at the same time. All

(j) 1 Bos. & Pull. 40. id. 647.  
3 Anstr. 935.

(k) 1 John. Cas. 243. 2 Str.  
1218. 3 East, 167.

(l) Vid. 1 Chitty's pl. 252.

(m) 4 T. R. 697. n. (b) 1 Bos.  
& Pull. 49. id. 19. 4 East, 589.

(n) 4 T. R. 697. n. (b) 1 Bos. &  
Pull. 19. id. 49. 16 John. 44.

the defendants, under this rule, may be inserted in a single summons, thereby giving it the operation of a separate summons for each. But, as this rule has never been directly applied to a justice's court, let the summons be in the following form, which will remove all doubt :

"YOU ARE HEREBY COMMANDED, in the name, &c. to summon A, B, C, D, E, F, (and so on to any number of defendants) severally and individually, each for himself, to appear before me, the said justice, on, &c. at, &c. then and there, severally and individually, each for himself as aforesaid, to answer JAMES JACKSON, in a plea, &c. to his damage of, &c."

It is obvious, however, that it will not do to blend a number of defendants in this process, where some are sued under the twenty-five, and others under the fifty dollar act. A summons should, in such case, be made out for each set of defendants, stating a sum in damages, correspondent to the jurisdiction, within which they are proceeded against.

Even where a warrant is issued against a number of defendants jointly, and only a part are taken, the plaintiff may, if the proceeding be for a wrong, upon which the defendants are liable jointly and severally, declare and proceed to judgment therefor, against such as are taken, omitting to notice the others, or stating that those who are taken, committed the wrong with the others named in the process, who are not taken.(o) But should the declaration and judgment, in such case, be against all, we have seen it would be error.(p)

3. How far the declaration must agree with the process, in the particular character, in which the plaintiff sues or the defendant is sued, we have seen, ante, p. 251. (Vide also 1 Chitty's pl. 253, 4. 2 Caines, 134.)

We have before noticed that the declaration need not agree with the process, in the cause of action therein expressed.(q)

2. THE DECLARATION MUST STATE ALL THE FACTS ESSENTIAL TO THE SUPPORT OF THE ACTION, WITH WHAT DEGREE OF CERTAINTY, IN GENERAL, WE HAVE ALREADY SEEN.

1. It must appear, with certainty, who are the parties, and a declaration by or against A. B. & Co. is not sufficient.(r) And

(o) 1 Wils. 90, 306. 2 John. 385. 12 John. 434. Ante, 269, 70.

(p) Ante, 269, 70.

(q) Ante, 251, 2. Vid. 16 John. 162. 10 id. 240.

(r) 8 T. R. 508. 3 Caines, 170. 1 Penn. Rep. 75, 137. Ante, 251.



where different persons, of the same name, are used in declaring, they should be distinguished by some appropriate allegation, as the said *first* or *second* mentioned *A*, or the *now* defendant, or the *now* plaintiff, or *A*, deceased.(s)

2. The declaration must state a *time* and *place*, though these, in general, are immaterial in proof, and the plaintiff may sustain his suit by proving that the cause of action arose on any other day, or at any place different from the one laid in the declaration. In the few cases of local actions, however, noticed ante, p. 11, 12, and in this instance alone, it is necessary that the proof agree with the declaration as to place, unless, indeed, the place be made matter of substance, as where the contract declared upon, relate to some particular place, or some particular place is in issue, as in trespass on lands, where the plaintiff has described the premises particularly. And so wholly immaterial is the time mentioned in the declaration, that if the plaintiff state a contract to have been made on a day which would render it unlawful, the defendant cannot, for that reason, demur, but must take issue, thereby giving the plaintiff an opportunity to prove on the trial some other day.(t) Yet, where the day is a material part of the contract, or other matter declared upon, it must be proved; as if the plaintiff complain, that the defendant violated a contract to work from such a day to such a day, he must prove it, and so of any other special contract; and if he set forth the date, or other time mentioned in a written instrument, the proof must tally precisely in this particular with the declaration, though otherwise if not set forth as a date, as we shall see more at large hereafter. Again, in respect of place, it should always appear in the declaration, that the cause of action arose within the jurisdiction of the justice, that is, within the county for which he is a magistrate. For this purpose, the law, where the cause of action is not strictly local, allows of a fiction, and you may state the cause of action as arising in the place out of the county where it really did arise, adding, to wit, "in the county of Saratoga," or other county, where the cause is tried. This can seldom be necessary, however, except in describing some instrument in writing. Suppose, for instance, a note made and dated at *Boston*, sued in the county of *Saratoga*. You are to declare, that the defendant made his promissory note at *Boston*, to wit, "at the town of *Saratoga Springs*, in the county of *Saratoga*," and so of other transitory matters, or causes of action. But, in general, you may state all foreign acts, as happening within the county where you sue, except when you are setting forth an instrument in writing, dated abroad.(u) If the declar-

(s) 1 Chitty's pl. 257.

(t) 12 John. 297,

(u) Vid. 1 Chitty's pl. 281, 2. id. 257, 3, 9, & 260. 13 John. 449, 50.

ation commence with stating the county where the cause is tried, thus, SARATOGA COUNTY, ss. though no place be stated in the body of the declaration, or even a foreign town and county be stated, yet the declaration will be good, as the act stated *without place* or with the *wrong place*, will be referred to, and considered in law as arising within *the county* in the margin.— And so if the county in the margin be *wrong*, but the county in the body of the declaration be *right*, the latter shall prevail over the place in the margin; and, in this sense, it is said, that the place in the margin will aid, but *not prejudice* a declaration. (v)

3. It is still more necessary, that *certainty* and *accuracy* be observed in stating the *material facts* constituting the *cause of action* itself, for this is matter of substance. But for this, more at large, we refer to the next head of,

### 3. THE PARTICULAR REQUISITES OF THE DECLARATION.

These are, 1. *Its commencement.* 2. *The statement of the cause of action.* 3. *Several counts.* 4. *The conclusion.*

1. The *commencement* of a declaration in a justice's court may, in general, be as follows: (Vide 6 Taunt. 121, 406.)

James Jackson, }  
v. } SARATOGA COUNTY, ss.  
Richard Roe. }

The plaintiff complains of the defendant, for this, to wit,  
(*Here state the circumstances which constitute the cause of action.*)

If the plaintiff sue, or the defendant is sued, in a particular character, entitle the cause accordingly, and then commence as above. Thus, if you sue as executor, entitle your cause, *James Jackson, executor of the last will and testament of A, deceased, v. Richard Roe.* Enough as to the different manner of entitling causes may be gathered, ante, p. 249, 50.

Where there are more than one party plaintiff or defendant, the plural, *plaintiffs*, or *defendants*, instead of the singular, *plaintiff*, or *defendant*, is of course, to be used, in the commencement, and other parts of the declaration.

2. The declaration, after commencing, proceeds to state the cause of action. This receives its name and character from the facts which are stated as the foundation of the claim, whatever

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(v) 1 Chitty's pl. 279, 80. 13  
John. 449, 50. Ante, 248. n. (8)

it may be called by the plaintiff, either in his process or declaration. Thus, should the plaintiff in the beginning of his declaration state, *that he complains of the defendant of a plea of trespass, for this, to wit,* and then go on to state the circumstances of the wrong which make it out to be *trespass on the case*, instead of *trespass*, and the defendant takes issue, and goes on to trial, and the proof makes out a claim for a *trespass on the case*, the defendant cannot object that this is a variance between the proof and the declaration, for the cause of action stated at length, shall be deemed the true one. (w)

These remarks would bring me to the forms of declarations, from which, in general, enough may be derived, to enable a plaintiff to state his cause of action with sufficient accuracy.— But there is one description of contract, with regard to which so much nicety is required in pleading, that a more particular consideration of the mode, in which it is to be declared on, becomes necessary. I allude to *special contracts not under seal, to do or not to do certain things, &c.* We have already bestowed some attention upon this topick, (ante, 51, 2, 3,) where the great caution to be exercised, in aiming at a correspondence between the *declaration* and *evidence*, was partially considered and illustrated. The contracts requiring the *special count* or *declaration*, of which we have spoken, in order to set them forth, may be varied to an infinite extent, and are therefore incapable of classification in their *purpose* or *object*. The following examples will show our meaning. These special counts are required on *wagers* : on *awards* : on *contracts to pay money in consideration of forbearance* : on *contracts to pay money on exchange of horses* : on *contracts to deliver a bill of exchange, or promissory note for goods sold* : or to *pay for goods sold to a third person, or to indemnify* : for not fulfilling a *contract to marry* : or a *contract to employ a servant* : or a *contract to perform works, &c.* for not performing a *contract to accept corn, &c. bought* : for not performing a *contract to deliver goods* : for a breach of *warranties* : against *bailees*, for not fulfilling their *contracts of bailment* : by a *landlord* against his *tenant, for not repairing, &c. &c.*

<sup>1</sup> In setting forth these, and the like special agreements, it is necessary that the plaintiff set forth, 1. *The consideration or motive*, upon which the agreement is founded. The nature of these considerations, in general, were considered, (ante, 26, 7) And we had occasion to consider them with sufficient par-

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(w) Vid. 1 Chitty's pl. 289, 14 John. 383.

ticularity, (ante, p. 38, 39, & 40,) as to what consideration will sustain an assumpsit, without noticing them again here. Illegal considerations are also considered, (ante, 132 to 144.) In setting forth this consideration, it must appear to be legal and sufficient on the face of the declaration, or the defendant may demur; it must be set forth truly, as it will appear in proof, or the plaintiff must be non-suited, provided the objection be taken. The whole of the consideration of the defendant's contract must also, in general, be stated, and if any part of an entire consideration, or of a consideration consisting of several things, be omitted, the plaintiff will fail upon the trial, on the ground of *variance*. It is, however, sufficient, in general, to state so much of any contract, consisting of several distinct parts and collateral provisions, as contains the entire consideration for the act, and the entire act, which is to be done in virtue of such consideration; and the rest of the contract, which only respects the liquidation of damages, after a right to them has accrued by a breach of the contract, is matter proper to be given in evidence to the justice or jury in reduction of damages, but not necessary to be shown to the court, in the first instance, on the face of the record. Where a *part* of a consideration, or *one* of several considerations, is *frivolous* and *void*, it is sufficient to notice only the valid consideration, though, if stated, it will not vitiate the declaration; but no mode of pleading can enable a plaintiff to recover, where part of an *executory* consideration is illegal. (x)

2. After stating the consideration, the contract itself must be set forth, in all its material parts, either in the *very words* in which it was made, or according to its *legal effect*: and, if there be a *variance* here, between the *declaration* and *proof*, it will be *fatal*. Vid. 1 Dunlap's N. Y. Pract. 251, and cases there cited, n. (92) & (93.) In stating the consideration, we have seen that it is necessary to set forth the whole, but in stating the *contract itself*, it is sufficient, merely to state the parts of the promise, the breach of which is complained of; and it is not necessary to state in the declaration other parts, not qualifying or varying in any respect, those the breach of which is complained of. As where the plaintiff declared, that in consideration of his re-delivery to the defendant of an unsound horse, which he had before then sold to the plaintiff, the defendant promised to deliver to him *another horse*, which would be worth £80, and be a *young horse*, and then alledged a breach in *both these respects*, his declaration was held sufficient, though the *proof* was, not

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(x) Vid. 1 Chitty's pl. 295, 6, & the cases there cited.



only of a promise, that the second horse should be worth £80, and be a young horse, but also of a warranty that it was sound, and had never been in harness. (y)

It is always sufficient to state so much as constitutes that provision in the contract, the breach of which is complained of, and which prescribes the duty to be performed, and the time, manner and other circumstances of its performance. There are a great variety of agreements not under seal, containing detailed provisions, regulating prices of labour, rates of hire, time and manner of performance, adjustment of differences, &c. which it may not be necessary to set forth ; (z) for, perhaps the plaintiff does not claim for a breach of any of these, but merely for the non-fulfilment of some other stipulation in the contract.

So any proviso or condition in the contract, which goes merely in defeasance of it, needs not be stated ; for this ought to come from the other side ; but if such proviso or condition constitute a condition precedent, or, if there be any other matter which qualifies the contract, or goes in discharge of the liability of the defendant, it ought to be stated. (a)

A contract in the alternative, must not be stated as an absolute contract, though the option were in the party pleading (b) These objections of variance, must, however, all be made at the trial, or they are waived. (15 John. 210.)

Where this contract is in writing, it is usual to follow the words of the contract, where they are concise and intelligible ; and, if the legal effect be doubtful, this is the safer course. The plaintiff, however, is not bound to set forth even the material parts in letters and words. It will be sufficient to state the substance and legal effect, which is shorter, and not liable to misrecitals and literal mistakes. (c)

3. Certain averments, that is, statements of facts, besides the consideration and contract, are sometimes, necessary in these declarations upon a special assumpsit. An averment in pleading, signifies a statement of facts, in opposition to argument or interference. (d) If there be any thing on the part of the plaintiff, which was to have been performed, as a condition, upon which the obligation on the part of the defendant was to attach, it must

(y) 1 Chitty's pl. 299, 300.

(b) Vid. id. 302.

(z) 6 East, 567, per Ld. Ellenborough, Ch. J.

(c) id.

(a) Vid. 1 Chitty's pl. 301, 2.

(d) id. 302.

be averred to have been performed, or offered or tendered to be performed, and the manner of performance, &c. must be shown, in order that it may appear to agree with the terms of the contract or condition.

Sometimes it is necessary to aver the performance, or an offer to perform the consideration. Where the consideration is *executed*, that is to say, where the promise is made in consideration of something already performed, or performed at the same time that the promise is made, it is enough to state this fact, without any farther averment. But where the consideration of the defendant's promise is, *executory*, that is, to be performed by the plaintiff, before the defendant is obliged to fulfil his engagement on his part, the plaintiff must aver that he has performed his part of the contract, or show some *excuse* for not having done so. He must show performance, or an offer to perform in the case of mutual covenants, and other agreements mentioned (*ante*, 23, 4,) either where the performance is to be at the same time on each side, or where the plaintiff's performance is expressly made a condition precedent. So of all agreements, where mutual acts are to be done at the same time. (e)

In averring an excuse of performance by the plaintiff, he must aver his readiness to perform the act, and the particular circumstances which constitute such excuse. And he should, in general, show that the defendant either prevented the performance, or rendered it unnecessary to do the prior act, by his neglect, or by his discharging the plaintiff from performance ;(f) and where the defendant had agreed to attend at a certain place, to receive from the plaintiff and his wife, a conveyance of certain lands, in an action for his non-attendance, it was holden sufficient, in a justice's court, in order to entitle the plaintiff to recover, to aver that *the plaintiff and his wife attended, at the place appointed, ready and offering to execute a conveyance according to the said agreement ; and that the defendant did not attend : and that he has refused to accept the same, and to perform the agreement on his part.*(g)

The omission of these averments, would be fatal on demurrer. (h)

Again : notice must sometimes be averred. Where the performance of a condition precedent, or other event, upon which

(e) 1 id. 309, 310. id. 216, 17.

(f) id. 317, 18.

(g) 1 Caines, 45, 6.

(h) 1 Chitty's pl. 319.

the defendants liability depends, lies more properly within the knowledge of the plaintiff than of the defendant, then the declaration ought to state express notice to the defendant of the performance of the condition precedent, or the happening of the event ; and this must be proved to have been given before suit brought ; but this is unnecessary, where the defendant has the same opportunity with the plaintiff to know the fact.(i)

Sometimes also a request is necessary to be averred ; but for this, we refer to the subsequent head of *tender*, where the cases in which this is necessary, will be fully considered and referred to.

This doctrine on the subject of a special *assumpsit*, is equally applicable to *contracts under seal*, with this difference only, that in setting forth the latter, no consideration need be averred.(j)

But the mode of pleading cannot be fully illustrated otherwise than by its forms, to which I shall now proceed.



## SECTION IX.

## FORMS OF DECLARATIONS.

I have supposed the declaration, after giving the names of the parties, in the title to the cause, in all cases to commence as stated, ante, p. 332. I shall, in giving the forms, use the title, *plaintiff* and *defendant*, instead of the names of the parties. Where the latter is preferred by the pleader, the change can easily be made ; but when their names have once been distinctly set forth in any pleading, it is sufficient afterwards to designate them as the *said plaintiff* or *plaintiffs*, the *said defendant* or *defendants*, without repeating their names.(k) This is sometimes highly useful for the purposes of brevity, where the parties are numerous. At any rate, it will answer me this purpose, in the manner they are to be used, in the forms which I propose giving, for I shall simply adopt in these, the initials P. and D. to represent the parties, *plaintiff* and *defendant*.

(i) id. 320, 1, 2.

(j) id. 300, 301, to 325.

(k) 4 Bos. &amp; Pull. 289. 6 Taunt. 121, 406.

The order in which I shall give these forms, will correspond with that in which I treated of the actions to which they relate, in CHAPTER II. (Ante, 19 to 246.) I shall therefore, exhibit forms of declarations, 1. *in debt*, 2. *detinue*, 3. *covenant*, 4. *trespass on the case*, and 5. *trespass*.

### 1. IN DEBT.

#### ON A JUDGMENT.

*Commencement, as ante, p. 332*

That the said P, by the judgment of the Supreme Court of Judicature of the state of New-York, (or "of the Court of Common Pleas, of the county of Saratoga") (or "of a court holden before A, one of the justices of the peace of the county of Saratoga," ) at the capitol, in the city of Albany, to wit, at the town of Saratoga Springs, in the county of Saratoga, (or, if in the court of Common Pleas, say, "at the court house, in the village of Ballston Spa, in the said county of Saratoga," ) (or, if in a justice's court, say "at the dwelling house of the said A. in the town of Saratoga Springs, in the said county," ) of the term of August, A. D. 1820, (or as the term of the court is,) (or, if in a justice's court, say, "on the 20th day of August, A. D. 1820," ) recovered against the said D, \$200, for a debt, and also \$10, for his damages, which he had sustained, as well by occasion of detaining the said debt, as for as his costs and charges, by him about his suit, in this behalf expended, (or if the recovery was in case, say, "\$200, for his damages, which he had sustained, as well by reason of a certain trespass on the case, as for his costs and charges, &c.") (or, if in any other form of action, state the fact accordingly,) (or, if the action be on a judgment for costs in favour of the defendant, say, "\$50, for his costs and charges, by him laid out, in and about the defence of a certain action of trespass on the case," or as the action is, "then lately prosecuted, against the said P, by the said D,) as by the record thereof more fully appears, (this is to be omitted, if the judgment were before a justice,) upon which said judgment, there is yet due from the said D, to the said P, the sum of \$50, whereof the said P, hath not had execution; yet the said D, although often required, hath not paid the said sum of \$50, or any part thereof, to the said P, but hath always refused, and still doth refuse so to do.

In this declaration, the nature of the action in the suit, in which the judgment was recovered, should be briefly stated, according to the fact, as also for what cause the recovery was had; as whether it was for *debt* and *costs*, as in an action of *debt*, *damages* and *costs*, as in other actions where judgment is for the plaintiff, or simply for *costs*, where judgment is for the defendant, &c.



## ON A PENAL BOND TO PAY MONEY.

That the said D, on the 1st day of May, A. D. 1820, at the town of Saratoga Springs, in the county of Saratoga, by his certain bond, sealed with his seal (and now shown to the court here, (1) the date whereof is the same day and year aforesaid) acknowledged himself to be held and firmly bound to the said P, in the sum of fifty dollars, to be paid to the said P, when the said D should be thereunto afterwards requested. Yet the said D, although often requested, &c. hath not paid the said sum of money, or any part thereof, to the said P; but has always refused, and still refuses so to do.

## ON A GAOL BOND, ASSIGNED TO THE PLAINTIFF.

That whereas the said P, on, &c. at a court, holden before *Philip Green*, Esq. then one of the justices of the peace of the said county, by the consideration and judgment of the same court, recovered against *Richard Roe*, twenty-five dollars, for his damages, as well by the occasion of the breaking certain covenants, then lately made by the said *Richard*, to and with the said P, as for his costs and charges by him about his suit in this behalf expended; and afterwards, on, &c. at, &c. at the same court, then and there holden before the said *Philip Green*, still being justice as aforesaid, the said P sued out a certain execution upon the said judgment, directed to any constable within the said county, commanding him to levy the said damages of the goods and chattels of the said *Richard Roe*, (his arms and accoutrements excepted) and to bring the money before the said justice, within thirty days thereafter, to render to the said P; and, that if sufficient goods and chattels could not be found,

How to plead a judgment in covenant, before a justice.

How to plead an execution issued by a justice.

(1) "AND NOW SHOWN, &c." This is called a *profert*, and is a necessary form, in all cases where a *deed* is pleaded. A *profert* must also be made of *letters testamentary*, or of *administration*, where the plaintiff sues in either of those characters, that is to say, the *letters testamentary*, &c. must be produced, in order to show the plaintiff's authority to sue in that particular character. The party against whom a deed or sealed contract is pleaded, is always entitled on demanding it to *overt*, i. e. to have a copy or sight of the deed, &c. before he pleads, with which the party pleading it must furnish him. 12 John. 401. If the party cannot make this *profert*, &c. he must state the reason in the pleading, as that it is lost by accident, destroyed by, or in the hands of the other party, or some other person, &c. (Vid. 1 Chitty's pl. 348 to 351.)

whereof he could cause the said damages to be made, then the said execution did further command the said constable, to take the body of the said *Richard Roe*, and convey him to the keeper of the common gaol of the said county, there to remain, until the said execution should be satisfied and paid. Which said execution afterwards, on the day and at the place last aforesaid, was delivered to *Thomas Noakes*, then being one of the constables of the said county, to be executed in due form of law. And the said *Thomas Noakes*, so still being constable as aforesaid, afterwards, on the day, and at the place last aforesaid, in virtue of the aforesaid execution, took and arrested the said *Richard Roe*, by his body, and then and there delivered him to *John Dunning*, Esq. then sheriff, and keeper of the gaol in the said county of Saratoga, who then and there received the said *Richard Roe* into his custody, by virtue of the said execution. And the said *Richard Roe*, so being in custody of the said keeper of the said gaol as aforesaid, did, afterwards, on the day and at the place aforesaid, together with the above named defendant, *John Stiles*, by a certain bond, dated the day and year last aforesaid, (and to the court here now shown) acknowledge themselves to be held and firmly bound unto the said *John Dunning*, (by the name and description of *John Dunning*, Esq. sheriff of the county of Saratoga) he the said *John Dunning* then being sheriff of the said county as aforesaid, in the penal sum of fifty dollars, to be paid to the said *John Dunning*, sheriff as aforesaid, when they the said *Richard Roe* and *John Stiles*, defendants in this suit, should be thereunto afterwards requested, subject to a certain condition there under written, that, if the said *Richard Roe*, should remain a true and faithful prisoner, and should not, at any time, or in any wise, escape, and go without the limits of the liberties of the said gaol, until discharged by due course of law, then the said obligation to be void, or else remain in full force and virtue. And afterwards, on the day and at the place last aforesaid, at the request of the said P, he the said *John Dunning*, still being sheriff as aforesaid, by an endorsement on the said bond, under the hand and seal of the said *John Dunning*, (and now shown to the court here, the date whereof is the same day and year last aforesaid) did, in the presence of two credible witnesses, sell, assign, and transfer the aforesaid

The delivery of process to an officer.

The arrest in virtue thereof.

Commitment to the custody of the sheriff.

The execution of the gaol bond.

And how to set the same forth.

The condition of a bond pleaded.

And the assignment set forth.

bond to the said P. And the said *Richard Roe*, afterwards, on the day and at the place last aforesaid, did escape and go at large, out of the limits aforesaid without the consent, and against the will of the said P, by reason whereof, an action hath accrued to the said P, to demand and have, of and from the said defendants in this suit, the aforesaid sum of fifty dollars. Yet the said defendants (although often requested, &c.) have not, nor hath either of them paid to the said P the said sum of fifty dollars, or any part thereof; but they to do this, have hitherto wholly refused, and still do refuse so to do.

An escape  
pleaded.

In order to avoid the danger of a variance, the party pleading a judgment, record, execution, bond, or other instrument in writing, should not set forth unnecessary particulars. Thus, in stating an execution, or other process, a bond, or other written instrument, he may say, generally, that it issued or was made, &c. on such a day, without stating its date, and if it turn out in proof that it issued, or was made, or even dated on a day differing from the day stated in pleading, it will be no variance; when at the same time, if the pleading profess to give the date, a variance in the proof will be fatal. (Vide 1 Chitty's pl. 258. 5 John. 100, 101.) And, in pleading an execution, it is safest to state, after setting forth the amount of the judgment, that the officer was commanded thereby to levy the *debt* and *damages*, or the *damages* and *costs* awarded by the judgment, without saying how much the execution was for. Where the execution was thus set forth, it was holden that even a variance between this and the judgment, in the *amount recovered*, could not be made an objection. (5 John. 89. id. 101, 2, per Kent, Ch. J. Vide also *Page v Woods*, 9 John. 82.)

DECLARATION AGAINST A CONSTABLE FOR OMITTING TO TAKE THE  
DEFENDANT'S PROPERTY AND BODY UPON AN EXECUTION.

*State the judgment, execution, and delivery thereof to the defendant, substantially as in the last precedent, and proceed in this form:*

And the said P avers, that, although within twenty days after the issuing, and before the return day of the said execution, goods and chattels of the said *Richard Roe*, sufficient to satisfy the said execution, were to be found by the said D within the

said county, yet the said D altogether neglected to levy the aforesaid execution on the same, or any other the goods and chattels of the said *Richard Roe*, within twenty days after he had received the said execution as aforesaid; and entirely neglected to pay the aforesaid damages into the hands of the said *Philip Green*, still being justice as aforesaid, within ten days after the lapse of the said twenty days, to wit, at, &c. although during the said thirty days, from the said time of his receiving the said execution as aforesaid, he the said D, was constable as aforesaid, by reason whereof, &c. (as before.)

*If you go for not taking the body, say:*

And the said P avers, that although no goods and chattels of the said *Richard Roe* were to be found in the said county, at any time within thirty days, from the said time when the said D received the said execution as aforesaid, yet the body of the said *Richard Roe* was to be found by the said D, within the said thirty days, he, the said D, during all that time, being constable as aforesaid; yet the said D altogether neglected, during all the thirty days aforesaid, to take the body of the said *Richard Roe*, and deliver him to the keeper of the common gaol of the said county, viz. at, &c. by reason, &c.

If there have been an *actual arrest and escape* from the execution, the mode of setting them forth may be sufficiently gathered from the preceding declaration on a gaol bond. It is many times useful to insert all these counts, viz. *one*, for not taking property, *another*, for not taking the body, and a *third*, for arresting and suffering an escape, stating at the end of the declaration as follows: "*The said P claims, in this action, a balance of debt of \$25 only, (or \$50 only, as the claim is,) to be recovered under all, or some of the above counts.*" By thus using the three counts, though the plaintiff's proof might fail as to *one*, it might support *another*.

DECLARATION FOR MONEY OR OTHER THING PAID AS USURY, &c.  
BY THE PARTY PAYING. (*Vide* 1 N. R. L. 64, 5. c. 2, 3.

That the said D, on, &c. at, &c. was indebted to the said P, in the sum of \$50, whereby an action accrued to the said P, according to the form of the statute, entitled, "an act for preventing usury," to demand and have of the said D, the said sum of \$50, yet the said D, although often requested so to do, &c.

This general form is given by the 3d section of the statute for preventing usury; and is the proper form, in all cases, where the party who pays the money or other thing, himself, brings



the action. This is the proper form, whether the usury was paid in *money*, or *any thing else*: and you are not bound to set forth any of the matter specially. Accordingly, under the above declaration for *money*, you may give in evidence, the payment of usury, &c. in *goods, lands, or any other thing*. (1 N. R. L. 64, 5. s. 2, 3.)

Under the act to prevent excessive and deceitful gaming (1 N. R. L. 151,) and the act to prevent horse racing, and for other purposes, &c. (id. 222) the party who looses any thing staked upon a *horse race*, or upon any gaming by lot or chance, may, in like manner, sue and recover it back, without setting forth the special matter in his declaration. In this case, by the 2d section of the first, and the 5th section of the last act, the party loosing may, in all cases, adopt the simple form of an action for money had and received, the form of a declaration in which, we shall hereafter give. This declaration need not even refer to the act. (15 John. 5.)

The action for *usury* must be brought by the party, within *one year* after the offence committed. (1 N. R. L. 64, 5, s. 2,) and for money or other thing lost at *horse racing*, or at *play*, within three months, (id. 153, s. 3.)—If the above periods are suffered to *elapse*, without a suit commenced by the party aggrieved, any other person may then, by the same statutes, sue and recover the money or other thing so paid or lost, the one half to go to the plaintiff and the other to the use of the overseers of the poor of the town, where the offence is committed; and in case of loss by *gaming*, under the 2d section of the act (1 N. R. L. 152,) *treble* the value of the loss is to be recovered, in an action *qui tam*. In this action *qui tam*, the plaintiff must declare specially, setting forth the particulars which constitute the offence, and must aver that the party aggrieved, *did not commence* his suit within the above periods respectively. (4 John. 193. 15 id. 5. 7 John. 402. 8 id. 218. S. C.) These penalties under the *gaming and horse racing acts*, &c. are now, as we shall notice more particularly hereafter, recoverable in the name of the *overseers*, &c. *only*, in those cases where debt *qui tam* formerly would lie. (Vide Laws, sess. 43, ch. 37.)

It is proper to observe, with regard to these actions on penal statutes, generally, that where a certain penalty is given in *money*, as well as where a suit is brought upon a *record* or *specially*, the plaintiff must state in his declaration, the *precise sum* which he claims, and which the penalty, &c. amounts to, and he must recover the *precise sum* or *nothing*. (1 H. Black. 249.) But in these actions under the *usury and gaming acts*, and in all other *penal actions* where no *precise sum* is mentioned in the *act* itself, but it is left to the justice or jury to

fix the amount, the plaintiff's declaration may claim such sum as is convenient, and he may recover *less* upon the trial, according to the amount which he *proves*, the same as in an action of *assumpsit*. (Cro. Jac. 498. 1 Day's Cas. 19.)

Where *executors* paid money under an *usurious contract* of their *testator*, they were allowed to recover it back, in an action under the statute, as in their *own right*, without describing themselves as *executors*. *Weed and anr. v. Beekman*, M. S. Supreme Court, October term, 1816.

DECLARATION IN DEBT, QUI TAM, UNDER THE STATUTE OF  
USURY.

That on, &c. at, &c. it was corruptly, and against the form of the statute in such case made and provided, agreed by and between one *John Doe*, and the said D, that the said D, should lend and advance to the said *John Doe*, one hundred dollars, and that the said D, should forbear and give day of payment thereof, to the said *John Doe*, until and upon the last day of August, then next ensuing, and that the said *John Doe*, for the loan of the said sum, and for the giving day of payment thereof, as aforesaid, for the time aforesaid, should give, pay and deliver to the said D, one certain steer of him, the said *John Doe*, and also that the said *John Doe*, should pay to the said, D, interest on the said \$100, from the day of aforesaid, until and upon the said last day of August, thereafter. And the said P avers, that afterwards, on, &c. at, &c. in pursuance of the said corrupt and unlawful agreement, so made as aforesaid, the said D, did lend and advance to the said *John Doe*, the said \$100, and that the said *John Doe*, did then and there give, pay and deliver to the said D, and he, the said D, did then and there receive of, and from the said *John Doe*, the aforesaid steer. And the said P. avers, that the said steer, was then and there worth the sum of \$10. And the said P farther avers, that the said *John Doe* did not, within one year, then next after the payment, delivery and receipt of the said steer, as aforesaid, commence his action, for the value of the said steer so delivered as aforesaid. By reason whereof, and by force of the statute in such case made and provided, an action hath accrued to the said P, who sues as well for the overseers aforesaid, as for himself, in this behalf, to demand and have of, and from, the said D, the said \$10. Yet the said D, &c. (allege, request and refusal to pay, &c. as ante, p. 341.

DECLARATION IN DEBT BY THE OVERSEERS, &c. UNDER THE  
STATUTE OF GAMING, &c.

That one *John Doe*, on, &c. at, &c. did, at the same time and sitting, by playing at a certain game of chance, called a game

at cards, lose to the said D. \$30, and then and there paid the same \$30, so lost as aforesaid, to him the said D. the winner thereof : And the said plaintiffs aver, that the said *John Doe* did not, within three months, next after the loss and payment of the said \$30, as aforesaid, sue or prosecute, in any manner, for the said \$30. so by him lost and paid as aforesaid. By reason whereof, and by force of the statutes in such case made and provided, an action hath accrued to the said plaintiffs, as overseers as aforesaid, to demand and have, of and from the said D. the said sum of \$90, above demanded, being treble the amount of the said \$30, so by the said *John Doe* lost and paid as aforesaid. Yet the said D. &c. (request and non payment, as ante, p. 338. (Vid. Burr 2018.)

As it is doubtful, whether this action, *qui tam*, will lie where the loss is less than \$25, (vid. 1 N. R. L. 153, s. 2, and id. 223, s. 5,) and as the recovery must be for treble damages, the above form will probably be of no other use here, than to illustrate the mode of declaring in the like cases, where a justice has jurisdiction ; unless, indeed, the plaintiff has a right to waive a part of the penalty, as was done in *Ely v. Van Buren*, (3 Caines, 218.)

When a penal statute gives one half, &c. to the overseers of the poor of the town, &c. where the offence is committed, the declaration is, perhaps. defective on demurrer, unless it alledge the offence to have been committed *in the town*, to which the overseers, &c. who are named in the action, belong. But, as this fact must be proved on the trial, even though the declaration alledge a different place, this will not be a valid objection, after verdict or judgment. (4 Burr. 2018.)

DECLARATION IN DEBT, BY THE OVERSEERS, &c. FOR SELLING SPIRITOUS LIQUOR WITHOUT LICENSE.

That the said D. did, on, &c. at, &c. sell to one J. S. by retail, one gill of rum, without having such license, as is required by the 3d section of the act of the legislature of the state of New-York, entitled " an act to lay a duty on strong liquors and for regulating inns and taverns." By reason whereof, and by force of the several statutes in such case made and provided, an action hath accrued to the said plaintiffs, as overseers as aforesaid, to demand and have of and from the said D. the said sum of \$25. Yet the said D. &c. (request and non-payment as before.)

FOR SELLING SPIRITOUS LIQUOR, WITHOUT HAVING ENTERED  
INTO RECOGNIZANCE.

That the said D, did, on, &c. at, &c. sell to one J. S. by retail, one gill of rum, to be drank in his the said D's house (*or his out house, &c. according to the fact,*) without having entered into such recognizance, as is required by the 6th section of the act of the legislature of the state of New-York, entitled, "an act to lay a duty on strong liquors, and for regulating inns and taverns." By reason whereof, &c. (as before.)

In *Blasdell v. Hewitt*, (3 Caines, 137,) which was an action for selling spiritous liquor, &c. Kent, Ch. J. says, that the omitting to state the *place* where this offence arose, is *alone* fatal, and Mr. Justice Spencer mentioned it as an objection to the declaration, that it wanted both *time* and *place*. The questions in that case, arose upon certiorari, but the declaration was *demurred to*, in the court below. It is, without doubt, necessary to state the *town*, or other district entitled to the penalty, and if this is not done, advantage may be taken of the omission by demurrer, and perhaps upon the trial, should a *wrong place* be stated; but after a verdict or judgment, without the objection being raised, most clearly it cannot be made, for the *first time*, on certiorari, whether the *place* be omitted altogether, or even a *wrong place* be stated. (4 Burr. 2018.) Mr. Justice Spencer, objected to the declaration, in that case, that it did not *negative* the *qualifications* of the *proviso*, in the 7th section of the act, which *allows* a sale of *metheglin, currant wine, &c.* made by any person, and not drank in his house, &c. Mr. Justice Livingston said, that it should have shown *what liquors* were sold; and Mr. Justice Thompson, concurred with Mr. Justice Spencer, in saying that the declaration should have *negatived* the *proviso*.—The declaration would, without doubt, as in other cases, be demurrable, for want of stating a day, but, when *stated*, any other day, before the commencement of the action, may be *proved*, as in other cases; and the justice may insert in the conviction, which is to be formally drawn, according to the 8th section of the §25 act, (1 N. R. L. 390,) the day stated in the declaration. (13 John. 253.) And this objection, therefore, of a want of *time* in the declaration, will not avail on certiorari. It is now, also, clearly settled by repeated decisions, that it is not necessary to *negative* the *proviso*, in the statute; for, wherever there is a *proviso* in a statute in favor of the party, it is to come from *him*, and need not be negatived by the plaintiff, or other party pleading it, in the first instance. (1 John. 513. 3 id. 438. 4 id. 304. 8 id. 4.)

A tavern keeper, having a regular license, is not liable for selling liquor *between* the time of its expiring, and the next meeting of the commissioners of excise. (2 John. Cas. 346.)



But in order to *make* a license regular, all the commissioners, viz. at least the *supervisor and two justices*, must assemble and agree to the license. If this be not done, it is void. (id.)

It is not sufficient for the plaintiff to declare, generally, for selling liquor, contrary to the 7th section of the act, but he should state specifically, whether the complaint be for selling liquor *without having license*, &c. or selling liquor *to be drunk in the defendant's house*, &c. *without having entered into a recognizance*, &c. for these are *two distinct* offences, both of which are described in that section. And where, under a declaration of this kind, the plaintiff proved the offence of *selling liquor to be drunk*, &c. though the defendant failed to show that he had a right thus to sell by having entered into a recognizance, and merely produced a *license to sell under five gallons*, which the justice overruled, and gave judgment for the plaintiff, this judgment was reversed, on certiorari, for this defect in the declaration. (13 John. 428.)

The court say, in giving their opinion upon this last case, that "it is a well settled rule, that, in declaring for offences against penal statutes (where no form is expressly given,) the plaintiff is bound to set forth specially, the facts on which he relies to constitute the offence. No form is prescribed by the statute in this case; and the plaintiff here declared against the defendant, for selling spiritous liquors, by retail, to A. and B. contrary to the 7th section of the act. This declaration does not embrace the offence of selling liquors, to be drunk in the house, &c. without recognizance; or, at least, it is equivocal. The defendant was not apprized that the latter offence would be charged against him, and, as to the first offence, his license was a complete answer."

Where the declaration was, that the defendant did, on such a day, sell *in the house of D. P.* and receive pay for one half pint of whiskey, which was then drunk in that house, *then occupied by the defendant*, without having such license, &c. and the proof supported the charge, this declaration was holden sufficient, after a verdict and judgment thereupon, and that it sufficiently showed *the house to be the defendant's*, and that the liquor was sold for the purpose of being drunk there. (5 John 122.)—This would, without doubt, have been different on demurrer.

In an action under the 16th section of the act concerning *slaves and servants*, (2 N. R. L. 206,) for trafficking with the slave, the plaintiff declared for the *penalty* only, without going for the treble value of the articles traded in, as he had a right to do by the act. The declaration did not specify the kind of goods traded in, and alledged that the defendant inoculated the slave. This declaration was holden sufficient after verdict and

judgment thereon, no objection having been made to its form in the court below. It was holden, moreover, that the plaintiff might waive the treble damages, which it did not lie with the defendant to object to ; that the allegation that the slave was inoculated, as it constituted no part of the offence, might be rejected as surplusage ; and (the contrary not appearing on the return) the court would intend, on certiorari, that the offence proved, warranted the penalty declared for. (3 Caines, 218.)

Where the plaintiff, in a *qui tam* action, declares as well for himself, as for the *people*, but fully sets forth an offence by which the penalty appears to be due to *him*, and no part to the *people*, such a declaration would be good even on demurrer, notwithstanding the mistake in mentioning the *people*. (10 John. 247.)

As to the liability of the husband, for a penalty incurred by the wife, and other matters relative to this action of debt on statute, *vid. ante*, 20, 21.

By the act (sess. 43. ch. 37.) a great variety of penalties, formerly the subject of *qui tam* actions, are given to the *overseers* of the poor *only*, whose duty it is thereby made, to prosecute therefor, viz. penalties arising under the "act to lay a duty on strong liquors, and for regulating inns and taverns ;" "an act to prevent the destruction of deer ;" "an act to prevent horse racing, and for other purposes therein mentioned ;" and an "act to prevent excessive and deceitful gaming," in cases where the whole, or any part of such penalty was formerly applicable to the support of the poor, &c.

For this action of debt, *generally*, *vid. ante*, 19, 20, 21.

## 2. DECLARATION IN DETINUE.

That the said P. on, &c. at, &c. was lawfully possessed of one certain silver watch, of the value of \$25, and being so thereof possessed, did afterwards, to wit, on the day and year aforesaid, at the place aforesaid, deliver the same watch to the said D. to be safely kept by him, on the following condition, to wit, that whenever the said P. should pay to the said D. the sum of \$10, the said D. should render to the said P. the said watch. And the said P. avers, that he did, afterwards, to wit, on the day, and at the place aforesaid pay the said \$10, to the said D. yet the said D. (although often requested) hath not rendered the said watch to the said P. but hath always refused, and still doth refuse so to do, and unjustly detains the same from the said P.

For this action of *detinue*, *vid. ante*, 22.

## 3. DECLARATIONS IN COVENANT.

## ON A SEALED NOTE.

That the said D, on, &c. at, &c. by a certain instrument in writing, sealed with the seal of the said D, (and to the court here now shown, the date whereof is the day and year aforesaid,) for value received, promised to pay the said P, fifty dollars, with interest, ten days after the date thereof. Yet the said D, (although often requested,) hath not paid the said sum of money, or any part thereof, to the said P, but the same to pay, hath always refused, and still doth refuse so to do. And so the said P saith, that the said D hath not kept his covenant, in form aforesaid made.

## DECLARATION ON AN INDENTURE OF LEASE FOR RENT.

That heretofore, to wit, on, &c. at, &c. by a certain indenture then and there made, between the said P, of the one part, and the said D, of the other part, (the counter part of which said indenture, sealed with the seal of the said D, is now here shown to the court, the date whereof is the same day and year aforesaid,) the said P did demise, set, and to farm let, to the said D, his executors, administrators and assigns, certain tenements, with the appurtenances, particularly mentioned and described, in the said indenture, situate in the said town of *Saratoga Springs*; to have and to hold the same unto the said D, his executors, administrators and assigns, from the first day of May then last past, for, and during, and until the full end and term of two years, thence next ensuing, and fully to be complete and ended; yielding and paying therefor, yearly and every year, to the said P, his heirs or assigns, the clear yearly rent of fifty dollars, payable in four equal quarterly payments. And the said D did thereby, for himself, his executors, administrators, and assigns, covenant, promise, and agree, to, and with the said P, his heirs and assigns, that he, the said D, his executors, administrators, or assigns, should and would, well and truly pay, or cause to be paid to the said P, his heirs or assigns, the said yearly rent, or sum of fifty dollars, at the several times aforesaid. Yet the said D, although often requested, &c. has not paid to the said P the aforesaid rent, or any part thereof, but the same to pay, hath always refused, and still doth refuse.

In declaring on a written or sealed contract, though it describe the parties as of such a *place*, and of such a *degree*, or *occupation*, this need not be noticed in the declaration, (Vide 2 Chitty's pl. 192, n. (f).) The *date* need not be stated. (4 East, 477.) If both parts of the deed be *originals*, i. e. *signed and sealed by all parties*, make the *profert* as of one part, &c. instead

of the counterpart, &c. (Vide 2 Chitty's pl. 192, n. (g.) The demise covenants, &c. and all the material parts of a contract, whether written, parol, or sealed, must be set forth, either *verbatim*, or according to their legal effect. (Ante, 334.) The premises need not be described at length, in *debt* or *covenant* on an indenture of lease. (2 Chitty's pl. 192, n. (i) It is not necessary to alledge, that the lessee for years *entered*. (id. 193, n. (n) The time when the rent became due must be specified. (id. 194, n. (q)

#### DECLARATION IN COVENANT FOR NOT REPAIRING.

*Containing an averment of the plaintiff's having performed a condition precedent.*

*Set forth the execution of the indenture, &c. and make protest as in the last; and then proceed as follows:*

And the said D. did thereby, for himself, his executors, administrators and assigns, covenant, promise and agree, to and with the said P. his heirs and assigns (amongst other things,) in manner following, that is to say, that he, the said D. and his assigns, from and after the dwelling house standing on the said premises, should have been put in good and tenantable repair by, and at the expense of the said P. his heirs or assigns, should and would, at all times during the continuance of the said demise, at his and their own costs and charges, support, uphold, maintain and keep the said dwelling house in good and tenantable repair, order and condition, and so leave the same, at the end, or other determination of the said term. And the said P. says, that, although the said dwelling house, after the making of the said indenture, to wit, on, &c. at, &c. was put in good and tenantable repair, by and at the expense of the said P. yet the said D. would not, and did not, at all times during the continuance of the said demise, or any part thereof, at his own costs and charges, or otherwise, support, uphold, maintain and keep the said dwelling house in good and tenantable repair, order and condition, or so leave the same at the end of the said term.

For this action of covenant generally, vid. ante, 23, 24.



## 4. DECLARATIONS IN TRESPASS ON THE CASE.

## FIRST. IN ASSUMPSIT.

## DECLARATION.

*In assumpsit on a special agreement, to receive the plaintiff into the defendant's service.*

That heretofore, to wit, on, &c. at, &c. in consideration that the said P, at the said D's request, had then and there agreed with the said D, to enter into his service, as a journeyman shoemaker, and would serve him, in that capacity, at certain wages, after the rate of \$200 a year, to be therefor paid, by the said D, to the said P, he the said D promised the said P, to receive him into the service of the said D, in the capacity aforesaid, and to employ him in such service at the wages aforesaid. And the said P avers, that he hath always been ready and willing to enter into the service of the said D, in the capacity aforesaid, and did afterwards, to wit, on, &c. at, &c. aforesaid, request the said D to receive him the said P, into the service of the said D, in the capacity aforesaid. Yet the said D, did not, nor would, at the said time, when he was requested as aforesaid, or at any time afterwards, receive the said P into the service of the said D, or employ him the said P, in such service, at the wages aforesaid, but wholly neglected and refused so to do; whereby the said P lost the chance of being employed by divers other persons, and remained and continued wholly unemployed for a long time, to wit, for the space of three months, then next following, and was otherwise greatly injured and damnified, to wit, at, &c.

Where the work has been actually performed, the declaration may be for work and labour, *generally*, (Fitzg. 302.) But where the defendant has refused to employ the plaintiff, the declaration must be special as above. (2 East, 145. Cowp. 437. 4 Esp. Rep. 77.)

*For not putting up a building.*

That heretofore, to wit, on, &c. at, &c. by a certain agreement then and there made, by and between the said P, and the said D, it was agreed, that the said D should frame, enclose, and lay the floors of a certain barn, with materials to be furnished by the said P, and that the same work should be commenced on the 1st day of May, A. D. 1819, and completed by the 1st day of June, in the same year, according to a certain plan thereof, then in the possession of the said D, for the consideration of fifty dollars, to be paid by the said P to the said D, on the same

work being completed by him. And afterwards, to wit, on, &c. at, &c. the said D, in consideration, that the said P had, at the request of the said D, promised him to perform his part of the said agreement, promised the said P that he, the said D, would perform his part of the said agreement. Yet the said P saith, that, although he hath always in every respect been ready and willing to perform his part of the said agreement, and did, on, &c. at, &c. offer the said D, to perform the same, and although the said P found, provided and furnished the materials for building the barn aforesaid, before the said 1st day of May, to wit, on, &c. at, &c. of all which the said D then and there had notice, and was moreover requested to perform his part of the said agreement. Yet the said D hath hitherto altogether neglected and refused to frame, enclose and lay the floors of the said barn in the manner, within the time, and according to the plan aforesaid; whereby the said P has not only sustained great damage in the exposure of the said materials to the weather, but was obliged to hire, and did hire another barn, in which to secure his clover hay, at a great price, to wit, at the price of ten dollars, to wit, at, &c. on, &c.

With what strictness a special agreement must be performed, vide ante, 59 to 62.

A *breach* of the contract set forth, should always be stated in the declaration, with a *request* to perform, or it will be bad on demurrer. Where a request is matter of substance, which we shall see when we come to speak of tender, it should be set forth with the circumstance of time and place, the same as any other essential fact. The contract must be stated to have been broken in its true sense and substance, and the breach should be neither larger nor smaller, than the engagement stated. If this be in the disjunctive, to do one of two things, the breach should deny the performance of either. It should be *certain* and *express*, and not *general*, as that the defendant has not performed his agreement. But these omissions must all be taken advantage of by demurrer. (Vide 1 Chitty's pl. 325 to 333, and the cases there cited.)

The terms of the contract are to be stated as in the agreement, and when in writing, it is usual to state that it was so. It must be shown in the declaration, that the defendant was to have a reward for the work, &c. or that he performed it unskillfully. (5 T. R. 143. 2 John. cas. 92. 4 John. 84. Ante, 33.)

Such damages as do not necessarily result from the breach of the contract, must be stated specially and circumstantially. Thus, *the want of employment*, in the shoe-maker's case, above stated, and the *ten dollars for hiring the barn*, in the last declaration,

not being a necessary consequence of the breach in either case, should be stated. (Vide 1 Chitty's pl. 332, 3.) In a late case, however, which was an action on a warranty of certain goods, under the general clause in the declaration, *that they became of no use or value to the plaintiff*, *Ld. Ellenborough* suffered the plaintiff to prove that he intended them for the Chinese market, that they were worth less there, than elsewhere; and he recovered damages accordingly, which was approved, on a motion for a new trial. (1 Starkie's Rep. 504.)

A declaration is demurrable, for claiming damages which appear on its face to have arisen *after* the commencement of the suit; though it would, without doubt, in a justice's court, be good after verdict or judgment. (Vide 1 Chitty's pl. 333.)

*Against an attorney for not appearing in a cause, whereby a default was obtained.*

That heretofore, to wit, on, &c. at, &c. in consideration that the said P, at the request of the said D, then and there retained him, as an attorney of the court of Common Pleas of the county of Saratoga, to defend a certain action of trover in the same court, by and at the suit of one *James Jackson*, against the said plaintiff in this suit, for certain reasonable fees and reward, to be therefore paid, by the said plaintiff in this suit to the said D, he the said D promised the said plaintiff in this suit, to conduct the said defence in a diligent manner, but afterwards, to wit, on, &c. at, &c. he, the said D, conducted the said suit in a negligent manner, in not appearing in the said suit, for, and in behalf of the plaintiff in this suit, and in not giving, in due season, any notice of appearance or retainer, in the said suit, whereby the said *James Jackson*, plaintiff in the said suit, in the said court of Common Pleas, afterwards, to wit, on, &c. at, &c. obtained a judgment by default, against the plaintiff in this suit, whereby he was put to great expense and trouble, in obtaining a rule to set the aforesaid judgment aside, in order to get let in to defend the aforesaid action, and hath been forced to pay, and hath paid to the said *Richard Roe* a large sum of money, for his costs of the aforesaid judgment, as a condition of having the same set aside by the said court of Common Pleas, to wit, at, &c. on, &c.

The above declaration need not be thus particular, and indeed, it is the safer as well as the more brief and convenient manner of declaring, merely to state, generally, that the defendant promised as above, upon the above consideration, to conduct the suit or defence diligently, but conducted the same in a negligent manner, without showing how particularly; in which case, he will be liable to prove the specific neglect according

to the fact. The same form may be adopted against any agent or mandatary. (Rep. Temp. Hardw. 309.) It is best to declare both ways in two counts. As to an attorney's liability, vide 4 Burr. 2061. 2 Wils. 325. 1 Saund. 312, n. 2. And of others, and the distinction where there is no reward, vide, 5 T. R. 143. 7 id. 171. 1 H. Bl. 158. 2 John. cas. 92. 4 John. 84. id. 185. Ante, 33.

*Against vendee, for not accepting wheat.*

That heretofore, to wit, on, &c. at, &c. the said D bargained and bought of the said P, and the said P, at his request, then and there sold to him, twenty bushels of wheat, at the price of two dollars per bushel, to be delivered by the said P to the said D, in a week, then next following, at the said D's dwelling house, in the said town, to be paid for, on the delivery thereof, as aforesaid; and, in consideration, that the said P had, at the said D's request, then and there promised him to deliver the said wheat as aforesaid, he the said D then and there promised to pay him, the said P, therefor, as aforesaid; and, although the said P afterwards, and within a week next after the making the said promise of the said D, to wit, at, &c. did then and there tender, and offer, and was then and there ready to deliver the said wheat to the said D, and requested him to accept the same, and pay therefor, as aforesaid, yet the said D then and there refused to accept the said wheat, and ever since has refused; and still does refuse so to do, and has always refused, and still refuses to pay for the same, as aforesaid, and every part thereof; and the said P has thereby been put to great expense in re-housing the same wheat, to wit, of ten dollars, besides his other damages, to wit, at, &c. on, &c.

As a common count, for goods bargained and sold, will, in general, answer every necessary purpose of the plaintiff, the above form need not be resorted to, except where you wish to recover special damage for re-housing or other special cause. (4 Esp. Rep. 251. 1 East, 194. 1 Ves. Jun. 530. 7 T. R. 67. Ante, 53, 4.) A count for goods bargained and sold, should, for greater caution, be added to the above, in the same declaration.

If, by the terms of the contract, it were not incumbent on the vendor to deliver at any particular place, but on the vendee to fetch the goods away from the defendant's premises, as is generally intended, when it is not otherwise agreed, (5 T. R. 409) the contract should be stated accordingly, and the defendant's agreement to fetch away, within a specified time, or a reasonable time, should be stated; and, in such case, it will be suffi-



cient to state the plaintiff's readiness to deliver. As to what constitutes a readiness to deliver, *vide ante*, 158.

At the close of the special count, if the goods have been resold at a sacrifice, as they may be, by reason of the defendant's default, (1 Salk. 113. *Ante*, 53, 4, and 54, 5,) state this fact accordingly.

*Declaration against a vendor, for not delivering wheat, at a specified time and place.*

That heretofore, to wit, on, &c. at, &c. the said P, at the said D's request, bargained with him, to buy of him twenty bushels of wheat, and the said D, then and there sold the same to the said P, at the price of two dollars per bushel, to be delivered, by the said D, to the said P, within one week, then next following, at E's grist mill, at, &c. to be paid for, on the delivery thereof: and, in consideration that the said P had then and there promised, at the request of the said D, to accept the same wheat of him, and to pay him for the same the price aforesaid, he the said D, promised to deliver the same to the said P as aforesaid. And, although the time for the aforesaid delivery, hath long since elapsed, and the said P was always within, and at the expiration of the said week, ready to receive and pay for the same, and offered the said D to pay for the same as aforesaid, to wit, at, &c. yet the said D neglected to deliver the said wheat as aforesaid.

The above two last precedents, varied according to the facts, will furnish a form in all cases of non-acceptance of, or non-payment for, goods, by the *vendee*, or the non-delivery of them, by the *vendor*.

In these cases, if either party would sue upon his agreement, the vendor, for not paying, or the vendee, for not delivering, the vendor must aver and prove a delivery or tender, and the other, a payment or tender; for delivering in the first bargain, was a condition precedent; and though there be mutual promises, yet, if one thing be the consideration of the other, there a performance is necessary to be averred, unless a certain day be appointed for the performance. (1 Saunders, 319.) If I sell you my horse for ten pounds, if you will have the horse, I must have the money, or if I will have the money, you must have the horse, &c. (1 Salk. 112, per Holt, Ch. J. *Ante*, 23, 4.) The same strictness, as to tender, is not necessary, where earnest has been paid. (5 T. R. 409.)

*Declaration in assumpsit, against a vendor, on a warranty of soundness in a horse.*

That the said P, on, &c. bargained with the said D to purchase of him a mare, for the sum of one hundred dollars, and in consideration that the said P would, at the request of the said D, buy of him the said mare as aforesaid, the said D then promised the said P, that the same mare was then sound; and the said P avers that he, confiding in the said warranty of soundness, did then buy the said mare of the said D, and paid him therefor, the said sum of one hundred dollars. Yet the said mare, at the time of the promise aforesaid of the said D, was not sound, but, on the contrary thereof, was then unsound, and, for that reason, became, and was of no use or value to the said P, and the said P hath been put to great charges, in and about feeding, keeping, and taking care of the said mare, amounting to twenty-five dollars.

I have stated no place in the body of this declaration; and no place need be stated, as we have seen before, (ante, 331, 2,) where the county is stated in the margin thus, *Saratoga County, ss*, as ante; in which manner I suppose all the above, and the following declarations to commence. If not stated in the margin, it is then necessary to mention a place in the body of the declaration. (9 John. 81.)

*I shall, accordingly, in the declarations, which follow, generally omit the statement of any place.*

The above declaration in assumpsit on warranty, is a very usual mode of declaring in courts of record. (2 East, 451, 2.) If it be doubtful whether the defendant hath a partner, declare in case. (Vide ante, 314.) When this count may be joined with one for a fraud, vide ante, 311.

The particular description of unsoundness need not be stated, it being a rule in pleading, that the breach may, in general, be assigned in the negative words of the contract. (2 Saund. 181. b. 3 T. R. 307.) This is much the most prudent, for if you state particulars, you are bound down to them in your proof. (3 T. R. 307.)

Under the above general allegation, that the goods *became and were of no use or value to the plaintiff*, he may show on the trial that he wanted the article for a particular purpose, (though this was unknown to the vendor) and recover special damages for its failing to answer such intended purpose; for instance, where the plaintiff buys horses or oxen to do his spring's work. (1 Starkie's Rep. 504.)

On the subject of warranties and frauds, *in general*, upon the sale of chattels, *vide ante*, 170 to 180.

The forms which I here give, in cases of warranty, may be readily applied to any other description, as that the horse is free from vice, &c.

Where the plaintiff is not sure of proving the exact price as stated, it is said the following brief form will serve in case of warranties, *viz.*

*Another form, (vide 2 Chitty's pl. 101) warranty on sale.*

That the said D, on, &c. in consideration, that the said P had, at the request of the said D, bought of him a certain horse, at a price then agreed between the said parties, the said D promised the said P that the said horse was, at the time of his said promise, sound. Yet in fact, he was not then sound, and thereby was of no use or value to the said P.

*Declaration in assumpsit, upon a warranty of soundness, on exchange.*

That, on, &c. in consideration, that the said P, at the said D's request, would deliver to him a horse of the said P, and would pay him ten dollars in exchange for a mare of the said D, he the said D, promised the said P, that the same mare was sound, and the said P avers, that, confiding in such promise, he did, afterwards, to wit, on, &c. deliver to the said D, the said horse of the said P, and pay him the said ten dollars, in exchange for the said mare. Yet, the said mare, at the time of making the aforesaid promise, was unsound, and became in consequence thereof, of no value to the said P, (state special damage, feeding, keeping, doctoring, taking care, &c. &c. if any.)

*Another and shorter form. Warranty on exchange.*

That, on, &c. in consideration, that the said P, at the said D's request, had delivered to him a horse of the said P, and paid him ten dollars, in exchange for the said D's mare, the said D then promised the said P that the said mare of the said D was then sound. Yet the said mare, at the time of such exchange, was unsound; and thereby became, &c. (as in the last.)

If your proof be not certain, as to *difference money*, &c. state, that in consideration, that the said P at the said D's request, had delivered to him a horse of the said P, and paid him a certain sum, then and there agreed upon, between the said parties, in exchange for the said D's mare, &c. (Vid. 2 Chitty's pl. 101.)

Where a negotiable note is given as a *price*, or *difference*, on a *sale* or *exchange*, it may be so stated, with the amount thereof, or, perhaps it may be stated as a payment in cash to its nominal amount. (Vid. ante, 80. 8 John. 202.) And where your witness does not recollect its contents, it is the practice, I find, to state it, *generally*, as a *note* or *piece of paper*. (7 Mass. Rep. 65.) How far this is warranted? Quere, (id.)

#### AGAINST BAILEES.

For the general doctrine of bailment, vid. ante, 30 to 35. Ante, 37.

**DEPOSIT.** Declaration against depositary for not taking care of, and safely returning goods entrusted to his care.

That, on, &c. in consideration, that the said P, at the said D's request, had delivered to him a silver watch, of the said P, of the value of \$25, to be taken care of, and safely kept, by the said D, for the said P, he, the said D, promised the said P, to take due and proper care thereof, and to safely keep, and re-deliver the same to the said P, on being thereto, afterwards, requested. Yet, although the said D, was afterwards, on, &c. requested by the said P to re-deliver to him the same watch, the said D did not take due and proper care of, and safely keep the said watch, for the said P, and did not, when so requested, re-deliver the same to him, but, in fact, the said D so negligently and carelessly conducted himself, with respect to the said watch, and took so little care thereof, that, by and through mere negligence, the said watch became, and was, lost to the said P, to wit, on, &c.

*Add a count on the single implied contract to re-deliver, omitting the allegation of carelessness.*

**MANDATE.** Against a mandatary, for negligently loosing goods received to carry.

That, on, &c. at the village of Saratoga Springs, in consideration, that the said P, at the said D's request, delivered to him, the said D, a certain silver watch, of the said P, of the value of \$25, to be carried by the said D from thence to the village of Ballston Spa, and there delivered to and at the shop of L, a watch repairer, in order to have the same watch repaired, the said D then, at the said village of Saratoga Springs, promised the said P, carefully to carry and deliver the same watch, as aforesaid. But, although the said D then and there received the said watch for the purpose aforesaid, he conducted himself so negligently, &c. (stating negligence and loss as in



*the last precedent,)* and the said D did not deliver the said watch to the said L, for the purpose aforesaid.

**LENDING FOR USE.** *Negligently galling the back of a borrowed horse.*

That, on, &c. at the village of *Saratoga Springs*, in consideration, that the said P had then delivered to the said D, at his request, a horse of the said P, for the purpose of the said D's riding the same horse from thence to the city of *Albany*, and thence back to the said village, the said D then, at the said village, promised the said P, to use the said horse in a careful manner, for the purpose aforesaid. But, although the said D received the said horse for the purpose aforesaid, yet he did not use the said horse in a careful manner, for the purpose aforesaid, but so negligently and carelessly conducted himself, in regard to the said horse, that by the mere carelessness and negligence of him the said D, the back of the said horse became, and was galled and sore, to such a degree, as rendered him utterly unfit for use by the said P, for a long time, to wit, for the space of one month, beside the said P being put to great expense, in and about feeding, keeping, taking care of, and curing the said horse, to wit, of \$50, to wit, on, &c.

**PLEDGING.** *For carelessly loosing goods pawned.*

That, on, &c. in consideration that the said P, at the said D's request, had then and there pawned and delivered to him, a watch of the said P, of the value of \$50, as, and by way of pledge to the said D, for the sum of \$25, then and there advanced by the said D to the said P, thereon, the said D then and there promised the said P, to take due and proper care of the said watch, until the same should be redeemed by the said P, and re-delivered to him. And, although the said D then and there received the said watch for the purpose, and on the terms aforesaid, yet he did not take due and proper care of the said watch, until the same was re-deemed and re-delivered as aforesaid: but afterwards, viz. on the day aforesaid, he, the said D, still having the custody of the same watch, for the purpose aforesaid, so negligently kept the said watch, and took so little care thereof, that in consequence of his mere negligence in that behalf, the same watch became and was wholly lost to the said P.

*Add a count on a deposit. (Ante, 358.)*

**LETTING TO HIRE.** *For riding a horse improperly.*

That, in consideration, that the said P, on, &c. at the said D's request, would let to hire, and deliver to him a horse of the

said P, for the said D to go and perform a certain journey therewith, to wit, from *Saratoga Springs*, in the said county, to the city of Albany, and from thence, back again to the said Springs, for a reasonable reward to the said P therefor, the said D promised the said P, that he would ride and use the same horse, in a moderate, careful and proper manner, for the purpose aforesaid. And the said P avers that in confidence of the said promise of the said D, he, the said P, did, afterwards, to wit, on, &c. let to hire, and deliver to him the said horse, for the purpose, and on the terms aforesaid. Yet the said D, in riding and using the said horse, for the purpose aforesaid, so immoderately, violently, carelessly and improperly rode and used the said horse, that thereby he was greatly hurt and injured, and so remained for a long time, to wit, for ten days, during which the said P lost the use of him, and was put to great expense in and about feeding and taking care of the same horse, and the said horse was, moreover, greatly lessened in value thereby.

*A shorter form.*

That, on, &c. in consideration, that the said P, at the said D's request, had let to hire and delivered to him, a horse of the said P, to be ridden and used by the said D, he then and there promised the said P, to ride and use the said horse in a moderate, careful and proper manner. Yet, although he then and there received the said horse, for the purpose aforesaid, yet he afterwards, to wit, on, &c. so carelessly and improperly rode and used the said horse, that thereby he became lamed and hurt, and so continued for a long time, to wit, ten days, and during that time was useless to the said P, and was, moreover, greatly diminished in value.

*If there be any doubt whether the injury was occasioned by improper riding, add a count nearly similar to the last, stating the defendant's promise as follows :*

That, whilst he should have the use of the said last mentioned horse, as aforesaid, he would take due and proper care thereof ;—and averring,—that the said D had the use, &c. and that, while he so had the use, he did not take due and proper care thereof.

*Add another count, omitting that it was for hire, viz. the count for lending, (ante, 359,) and if there be any demand for horse hire, it may be declared for, in a separate count, (which see post among the common counts,) in the same declaration.*

**HIRING OF WORK.** *Against a watch maker for loosing a watch, delivered to him to repair.*

That, the said D, before, and at the time of his promise here<sup>in</sup> after next mentioned, was a watch maker and repairer by trade; and, on, &c. in consideration, that the said P, at his request, had then and there delivered to him, a watch of the said P, of the value \$25, to be repaired by the said D, for a reasonable reward to be therefor paid him by the said P, he, the said D, promised to repair the said watch, and to take proper care thereof, till it should be returned to the said P, but the said D, afterwards, on, &c. so carelessly conducted himself with regard to the said watch, that through his mere negligence, the said watch was, and still is, wholly lost to the said P.

*Against the same.—Count for not delivering the watch.*

That, on, &c. in consideration, that the said P, at the said D's request, had then and there delivered to him, he being then and there a watch maker and repairer by trade, a certain watch of the said P, of the value of \$50, to be rectified by the said D, for a certain reward to be therefor paid to him, the said D promised to endeavour to rectify the same, within a reasonable time then next following, and to re-deliver the same to the said P, whenever, after such reasonable time had elapsed, he should be thereto requested. Yet, although a reasonable time for the purpose aforesaid, had elapsed, on, &c. and although the said P, then, requested the said D, to re-deliver the said watch to the said P, the said D then did, and still does, refuse so to do.

*If it is thought the defendant has converted the watch, it is best to declare in case, and add a count in trover. Indeed, it seems that a loss by the bailee, is itself, when unexplained, evidence of a conversion. (Vid. ante, 165.)*

*Against a farrier, for badly shoeing a horse.*

That, on, &c. the said P, had, at the said D's request, retained the said D, (he then being a farrier,) to shoe the said P's horse, in consideration thereof, and a reasonable reward therefor, to be paid him by the said P, he then promised the said P, to shoe the said horse in a skilful and proper manner, and received the said horse for the purpose aforesaid. Yet he did not shoe the said horse in a skilful and proper manner, but afterwards, to wit, on, &c. through his mere carelessness and negligence, in this behalf, the near foot before, of the said horse, was pricked and wounded, and besides, he then put too narrow a shoe

on the said horse, and thereby and otherwise, improperly shod him ; by reason whereof, the said horse was, for a long time, useless to the said P, and he expended large sums in and about healing the said horse, and, moreover, the said horse is much injured in his value by the cause aforesaid.

*Against a carrier for the loss of a box.*

That, on, &c. the said P, at the request of the said D, delivered to him a box, containing apparel to the value of \$50, of the said P, to be carefully carried in the said D's waggon, from, &c. to, &c. and there to be safely delivered by the said D, for the said P. And in consideration thereof, and of a certain reward to him to be paid therefor, by the said P, the said D then promised the said P, carefully to carry, convey and deliver the same box and contents, as aforesaid, and did then receive the said box and contents, for the purpose aforesaid. Yet the said D did not carefully carry the said box and contents, as he had promised as aforesaid, nor deliver the same in manner above mentioned, but afterwards, to wit, on, &c. through the mere carelessness and negligence of the said D, the said box and its contents aforesaid became and were wholly lost to the said P.

These declarations in *assumpsit* against bailees, seek to redress the various injuries arising from their ignorance, carelessness and fraud, which we have noticed, at large, (ante, 30 to 35.) And the above forms, with proper modifications, may be adapted to meet the numerous and different shapes in which these injuries may arise.

One thing perhaps is worthy of notice here. It is obvious that, in the above cases, *on a trial*, the plaintiff's proof will seldom, perhaps never, literally support his declaration. Indeed it *never does*, in an action on contracts implied by law.— Thus, that an attorney was retained at his own request, as stated (ante, 353 :) that the plaintiff bargained to buy wheat of the defendant, at the defendant's request, as (ante, 355,) or that the plaintiff had promised, at his request, to accept it of him, and pay him therefor : (id.) that the attorney promised, diligently to defend the suit, (ante, 353 :) that a watch is delivered in deposit, or to a mandatary, at the depository's or mandatary's request, where there is no reward whatever, and that they promised safely to keep or carry the same, according to the nature of the bailment, (ante, 358 :) that the hirer, or borrower of a horse, promised to use him carefully, &c. as (ante, 359, 60,) are all material allegations, in the declaration, but are seldom, and perhaps never literally true, and cannot actually be made out in proof. The same remark will apply to requests and promises, in millions of instances. And though you cannot



prove them, yet the law will imply all these from a certain state of facts and adjudge them proved. Thus, if I take a note as an attorney to collect, or goods as a depositary, or mandatary, or you buy wheat of me, or promise to do so, the law implies my request for these things. It also implies my duty to use ordinary diligence to collect the note or to keep the goods, or my duty about them, as a depositary or mandatary, which I violate by gross neglect. (Vid. ante, 31 to 35.) So in all the claims, to which the following common counts are applicable, both a request and promise are implied by law. And so with regard to almost any simple contract, though it be express, certain points are implied by law, beyond what can be literally proved, and which points are also, generally, set forth in the declaration. Thus, a promise subsequent, to pay or perform, according to the contract on either side, is, generally, stated in the declaration, even in case of express contracts. This cannot, in general, be proved, but is left to be implied by law. For these implied promises, generally, vid. ante, 25, 53, 59, 68, to 82. The law also implies a promise to fulfil all the duties of bailor and bailee, (ante, 31 to 35.) Indeed, most of the claims in the commercial world, rest upon these implied requests and promises.—And they must be stated in the declaration, whether in a justice's court or court of record, or it may be objected to by a demurrer. (14 John. 369.)

Again, for the reasons stated (ante, 314,) it may be useful, sometimes, to declare in case, as for a wrong, and not in assumpsit against bailees, attornies and agents, &c. &c. This may be done. For this purpose, you omit the consideration and promise, and shape your declaration into the charge of a mere wrong. In the case of bailees, for instance, you declare that you delivered the goods to the bailee, for a certain purpose, as in the above forms, who received them for that purpose, and then go on and state the negligence and the injury resulting from it. In the case of attornies, agents, &c. you merely alledge, that you gave in charge to, and retained them, to do certain business, (specifying it) of which they assumed the charge, and conduct, and then aver their negligence as in other cases.

This distinction is more of form than of substance, but it is sometimes necessary to be understood and resorted to, with a view to other counts, or the number of parties. (3 East, 62, 70. Ante, 314.)

For this action on the case, against a bailee, vid. ante, 185, 6.

## DECLARATION FOR BREACH OF A MARRIAGE PROMISE.

That, on, &c. in consideration, that the said P being then sole and unmarried, at the request of the said D, had then promised the said D to marry him, when she the said P, should be there unto afterwards requested, he, the said D, then promised the said P to marry her, when the said D should be thereunto afterwards requested. And the said P avers, that, confiding in the said D's said promise, she hath always from thence hitherto remained, and still is, sole and unmarried, and hath been, for and during all the time aforesaid, and still is, ready and willing to marry him the said D. Yet the said D, after the making of his said promise, to wit, on, &c. married a certain other person, to wit, one E.

*If the defendant hath not married another, an offer and request must be stated as follows:*

And, although the said P, after the making of the said promise of the said D, to wit, on, &c. requested the said D to marry her, yet the said D did not, nor would, at the said time, when he was so requested as aforesaid, or at any time before or afterwards, marry her the said P, but hath, hitherto, wholly neglected and refused, and still doth refuse so to do.

*Add a count for a promise to marry, within a reasonable time, and a promise to marry, generally, without stating any time. If the promise to marry at a certain time, add a count for this accordingly.*

## DECLARATIONS ON INLAND BILLS AND PROMISSORY NOTES.

ON BILLS.—*Payee against drawer.* That the said D, on, &c. drew a certain bill in writing, subscribed with his hand, and directed the same to one E. F. whereby he requested the said E. F. to pay to the said P, or order, on sight thereof, (or ten days after sight, &c.) \$50, being for value received. Which said bill, so made and subscribed, the said P, afterwards, to wit, on, &c. presented to the said E. F. and then required him, the said E. F. to accept the same, and to pay to the said P, the said \$50, but he, the said E. F. then refused to accept the same, and pay the said \$50, of which the said D afterwards, to wit, on the same day and year last mentioned, had notice, by reason whereof, the said D became liable to pay the said P, the said sum of \$50, and being so liable, the said D, afterwards, on, &c. promised the said P to pay him the said sum of \$50, on being thereto afterwards requested, yet the said D, although often

requested. &c. hath not paid the said sum of \$50, to the said P, but hath hitherto refused, and still doth refuse, so to do.

*Payee against acceptor.*

That one E. F. on, &c. drew a certain bill in writing, subscribed with his hand, and directed the same to the said D, whereby he required the said D to pay to the said P, on sight thereof, (or within ten days. &c.) \$50, for value received, and the said P, in fact says, that afterwards, to wit, on, &c. the said D accepted the said bill, and thereby became, and now is, liable to pay the said sum in the same mentioned, to the said P, according to the tenor thereof; and in consideration thereof, afterwards, on, &c. promised the said P so to do. Yet the said D, (although often requested, &c.) hath not paid the same to the said P, but has hitherto refused, and still doth refuse, so to do.

*Drawer against acceptor, on a bill returned and taken up by the drawer.*

That, on, &c. the said P made his certain bill of exchange, in writing, dated the day and year aforesaid, directed to the said D, by which the said P requested the said D, two months after the date thereof, to pay one E. F. or order, \$50, value received, and then delivered the same to the said E. F. and the said D, afterwards, on, &c. on sight thereof, accepted the same, and the said P avers, that afterwards, when the said bill became payable, to wit, on, &c. the said bill was presented to the said D, for payment thereof, and he was then requested to pay the sum therein mentioned, according to its tenor, and effect, and his said acceptance; but he did not, on its being so presented, or at any time since, pay the said sum of money or any part thereof. And thereupon, afterwards, on, &c. the said bill was returned to the said P, for non-payment thereof, and the said P, as drawer thereof, was then called upon to pay, and did pay, the said sum therein specified, to the said E. F. with the interest due thereon. Whereby the said D became liable to pay the said sum of money specified in the said bill, with the said interest, to the said P. and afterwards, on, &c. in consideration thereof, promised the said P to pay the same to him, when he, the said D, should be thereto afterwards requested. Yet the said D, although often requested, &c. has not paid the said sums to the said P, but did hitherto, and still doth refuse, so to do.

These are all the forms necessary on bills. When payable so long *after date*, the *date* should be set out in the declaration, as in the last. In what cases, it is material to be exact in stating the *day* of the *request* and *notice*, whether in the case o

*bills or notes*, may be gathered, ante, 101 to 117. In these cases, however, the better opinion is, that a *mistake of the day*, in declaring, would not preclude the proof of the *real day*, especially in a justice's court. It will not in *any* court, if stated in this form, "*to wit, on, &c.*" the *videlicet* changing it into mere matter of *form*, although it is *material* in the *proof*. (Vide Chitty on bills, Brookfield ed. 390, n. 8.) The mode of declaring against the various parties to a bill, being, in all cases except the above, so nearly similar to that upon *promissory notes*, the following forms of declarations upon the latter, may be easily shaped to meet the like cases arising upon the former.

ON PROMISSORY NOTES.—*Payee against maker.*

That the said D, on, &c. made his promissory note, dated the day and year aforesaid, and thereby, for value received, promised to pay the said P, or order, thirty-five dollars, thirty days after the date thereof. Yet the said D, although often requested, &c. has not paid the said sum, or any part thereof, but hitherto did and still does neglect to pay the same.

*Indorsee against maker.*

That the said D, on, &c. made his promissory note, dated, &c. and thereby, for value received, promised to pay one *James Jackson*, or order, thirty-five dollars, thirty days after date, which said *James Jackson*, after the making of the said note, on, &c. indorsed the said note, and, thereby, ordered the contents thereof to be paid to the said P, or order. Yet the said D, although often requested, &c. has not paid the said sum, or any part thereof, to the said P, but hitherto did, and still does neglect so to do.

*Indorsee against 1st indorser.*

That on the first day of September, 1820, one *Richard Roe* made his promissory note, dated the day and year aforesaid, and thereby, for value received, promised to pay the said D, or order, thirty-five dollars, thirty days after date, and the said D afterwards, on the same 1st day of May, made his indorsement thereon, and thereby ordered the contents thereof to be paid to the said P, or order; and the said P, to wit, on the 4th day of October, 1820, demanded payment of the said sum, mentioned in the said note, of the said *Richard Roe*, who then refused to pay the same, of which the said D, afterwards, to wit, on the same 4th day of October, had notice. Yet the said D, (as before.)



*Holder by delivery from payee, against maker, on note payable to bearer.*

That on the 1st day of May, &c. the said D made, &c. and thereby, for value received, promised to pay *James Jackson*, or bearer, thirty-five dollars, ten days after date, and afterwards, on the day and year aforesaid, the said *James Jackson* delivered the said note to the said P, who thereby became, and still is, the bearer thereof. Yet the said D has not paid, &c. (as before.)

*Indorsee against 2d, 3d or 4th indorser, &c.*

*Describe the note and first indorsement, as ante, in the declaration, by indorsee against first indorser, and state the subsequent indorsements down to the holder as follows :*

And the said *John Stiles*, (the first indorsee,) then indorsed, and delivered the said note, to one *Thomas Noakes*, and the said *Thomas Noakes* then indorsed, and delivered the said note to one *John Denn*, and the said *John Denn* then indorsed and delivered the said note, to the said P.

*And so through any number of indorsers, down to the plaintiff: follow this by the averment of demand upon the maker, and notice to the indorser sued, as in the said declaration by indorsee against first indorser, and conclude with a breach in the usual form, as given above.*

*The same form of stating indorsements is, in all cases, applicable to a note payable to bearer, when such note is transferred by indorsement, instead of delivery.*

*The indorsements are also stated in the same form, in an action by the holder of a note, against the maker.*

*Indorsements, demand and notice, in a suit upon a bill of exchange, are also stated in the same manner, with the difference of calling it a bill instead of a note.*

Another mode of declaring upon bills or notes, is, to adopt the general money counts, the forms of which we shall presently give. Where the plaintiff joins a count on the bill or note, with the money counts, in the same declaration, he may elect, on the trial, which count he will prove the instrument under, and if he fail on the count setting forth the bill or note, from the circumstance of not having described it properly, or any other cause, which does not destroy the operation of the note, he may then elect to apply it to money count. (18 John. 14.)

The use and advantage of using these counts upon a bill or note, were considered, ante, 127, 8, together with the cases in which they are admissible.

BUT NOTE: I take this, the first opportunity which occurs, to correct an error I there committed, by confining these cases of their admissibility, within the limits of the English doctrine. I there remarked, "that this must be understood of the *immediate* parties, and, as between others, an indorsee, for instance, and the acceptor, drawer, or a remote indorser, the *declaration* and *proof* must be confined strictly to the bill or note." (Ante, 123.) Such is doubtless the English rule, if we are to be guided by the later decisions of that country. But the rule is broader with us.

In *Pierce v. Crafts*, 12 John. 90, these counts are, I think, made universally proper, wherever the action is on a bill or note, be it between the immediate or remote parties. The point directly decided in that case was, *that the holder of a note payable to A B, or bearer, may recover upon it, in a suit against the maker, under the money counts.* The court are equally explicit, in saying, that an indorsee may recover in the same form against the maker, and they expressly over-rule the doctrine, which requires *privity of contract*. They recognize the case of *Tatlock v. Harris*, 3 T. R. 174, which gives the same form, by an indorsee against the acceptor of a bill, and *Grant v. Vaughn*, 3 Burr, 1516, which authorizes these counts, by the bearer against the drawer of a bill of exchange. Now we have seen, ante, 108, 9, that the act of indorsing either a bill or note, substantially, constitutes the relation of *drawer* and *payee*, between the indorser and indorsee, and, that, consequently, any subsequent indorsee, or holder, stands in the same relation to the indorser, though remote, as the indorsee or bearer stands in, to the drawer of a bill. This notion, with the doctrine before laid down, ante, 127, 8, taken in connexion with the rule in the above case of *Pierce v. Crafts*, seems entirely to supersede the necessity of declaring directly upon a *note* or *bill*, be the parties whom they may. (Vide also 3 John. cas. 5.)

Nor is it an objection, that this general mode of declaring subjects the defendant to an unfair surprise, for he may always protect himself against this, by demanding a bill of particulars, in the manner we shall hereafter notice, which demand the justice is bound to allow as a matter of right, and in answer to which, the plaintiff is obliged to state, briefly, the bill or note upon which he claims, with the several indorsements. (12 John. 94. Tidd's prac. 534.)

The rule then, as deducible from the above case of *Pierce v. Crafts*, and the cases there cited and recognized by the Supreme Court as law, is,—that wherever the plaintiff is entitled to recover under a declaration directly upon a bill or note, or upon a bill or note transferred, either as between the original parties, or in virtue of such transfer, as between the parties not original, he may omit all description of, or allusion to, such instrument, in his declaration, may declare in the money counts only, and give the instrument and transfer or transfers thereof in evidence, which will, in itself, be sufficient evidence to maintain such action.

Under this rule, it is obvious, that, where there is the least difficulty or nicety in declaring specially upon the instrument itself, or the transfer thereof, the money counts, for the greater caution, should always be joined in the same declaration with the special count, or else be adopted as the only counts in the declaration.

#### COMMON COUNTS.

##### *Use and occupation.*

That the said D was indebted to the said P in twenty-five dollars, for the use and occupation of a certain piece of land, by and at the request of the said D, and by the permission of the said P, for a long time then elapsed, used and occupied by the said D, and being so indebted, the said D afterwards, on the day aforesaid, promised the said P to pay him, the said sum of twenty-five dollars, when he should be thereto afterwards requested. Yet the said D, although often requested, &c. (*breach is the same as in count on bill, note, &c.*)

On these common counts, the plaintiff is never holden, in proof, to the precise sum stated.

In a count for use and occupation, it is never necessary to be precise, in stating the *place* where the premises lie. It is better not to state a place; for, if stated, the plaintiff will be holden to it in proof, and a mistake will be fatal to the action. (6 East, 348. 1 Esp. Rep. 273.)

The above form for use and occupation can easily be adapted to use and occupation of any other description of premises, as a *building*, a *room*, a *landing*, a *barn*, a *stable*, a *garden*, &c. &c. For the action for use and occupation, generally, vide ante, 81, &c.

These common counts, after commencing the declaration, as directed, ante, 332, all run in the above form, in the count

for use and occupation, viz. "that the said D was indebted, &c.<sup>27</sup> down to the sum stated: "in the sum of twenty-five dollars," or "fifty dollars," or other sum, as the plaintiff chooses to state, in order to cover his demand. And the *breach* is always in this form: "Yet the said D, although often requested, &c. has not paid the said sum of twenty-five dollars, or any part thereof, to the said P, but the same to pay hitherto did, and still does refuse."

With these remarks, I shall, in giving the common counts, merely state the *cause of action*.

I shall give no form for what are technically called the counts on a *quantum meruit* and *quantum valebant*, for the reason given in 2 Saunders, 122, n. 2; viz. that counts with a *price stated* will, in all cases, answer the same purpose. (Vide also 2 Chitty's pl. 6, n. (2).)

#### COMMON COUNTS CONTINUED.

**For toll of bridge.** For divers tolls and duties due by the said D to the said P, for the passage of divers waggons, carts, and other carriages of the said D over a certain toll bridge of the said P, situate in the towns of Moreau, and Queensbury, on the Hudson River.

**No. of turnpike.** For divers tolls and duties due by the said D to the said P, at a certain turnpike gate of the said P, at the town of Halfmoon, in the said county, for divers cattle and carriages of the said D, which before that time, had travelled on the said road, through the gate aforesaid.

**For goods bargained and sold.** For divers goods, wares and merchandize, by the said P, before then bargained and sold to the said D at his request.

*This form can easily be adapted to crops, as grass, turnips, corn, potatoes, timber, &c. bargained and sold.*

*When this count is applicable, vide ante, 53, 4. 1 East, 194. 1 Ves. Jun. 530.*

**Goods sold, &c.** For divers goods, wares and merchandize, before then sold and delivered by the said P to the said D, at his request.

*For this action, generally, vide ante, 53 to 59.*



This may be adapted to crops, standing timber, &c. as mentioned of the count for goods bargained and sold, thus :

For a certain crop of grass, (or for certain stand- Crops sold, ing timber, &c.) before then sold and delivered, by &c. the said P, to the said D, at his request.

For meat, drink, washing, lodging, and other ne- For necess- cessaries, before then found and provided, by the ries. said P for the said D, at his request.

For horse meat, stabling, care and attendance, Horse meat, before then found. provided and bestowed, for, in &c. and about the feeding and keeping of divers horses, mares and geldings, of, and for the said D at his request.

For the depasturing and feeding divers cattle by Pasturing, the said P, before then depastured, in certain pas- &c. tures of the said P, for the said D, and at his request.

For the use and hire of divers horses and carria- Hire of horses, ges, bridles, saddles, and harness, and of divers carriages, or chaises, and other carriages, (or of certain plate, goods, &c. linen, china, furniture, beds, and bedding, or goods and chattels, &c.) before then let to hire and delivered to the said D at his request.

For the lighterage, wharfage and ware house Lighterage, room, of divers goods, wares and merchandize, by wharfage and the said D, before then shipped and landed, in and ware house by certain lighters and other vessels of the said P, room. and deposited and kept, in and upon a certain wharf, and certain ware houses and premises of the said P for the said D, and at his request.

For the good will of a certain business of the said The good will P, before then relinquished and given up, by the of business. said P, to, and in favour of the said D, at his request.

For the work and labour, care and diligence of Work and la- the said P, before then done, performed and be- bour, general- stowed, in and about the business of the said D, for ly. the said D, and at his request.

Work, labour  
and materials  
found.

For the work and labour, care and diligence, &c. (as in the last count) and for divers materials, and other necessary things, used and provided, in, and about that work and labour, by the said P, for the said D, and at his request;

*For this action, generally, vide ante, 59 to 68.*

This general mode of declaring, as in the two last counts, will suffice, in all cases, without stating the *kind of services*, though the latter may be done, if it be thought best.

Thus: attorneys, counsellors, solicitors, surgeons, physicians, clergymen, hired servants, sailors, ship's officers, pilots, clerks of court, agents of all kinds, carriers, factors, surveyors, school teachers, justices, constables, &c. &c. may, in actions for their fees, wages, and materials found, in the course of their business, declare in the above general form, and give their special services in evidence. If, however, they prefer stating the particular kind of service, for which they sue, it is easy to state the capacity, in which they were performed, by adding, after the word, "*bestowed*," in the above count for *work and labour*, the words, "*as attorney*," "*counsellor*," or "*physician*," &c. (Vide 2 Saund. 350, n. 2. 1 Chitty's pl. 340.)

I remarked, ante, 67, that, "*in all cases, if the agreement be not under seal, though it be never so special and multifarious, if the services be performed under it, and the agreement thus fulfilled, the plaintiff need not, in an action, set it forth, and declare upon it specially; but may claim and recover under a general count for work and labour.*" This should be understood with the qualification, that the services are, by the agreement, to be paid for in *money*, and that the money is actually due, by the terms of it. (Vide 1 Chitty's pl. 339.) And in all the like cases, whether such stipulated price be due for services, or goods, &c. a general count, according to its nature, for work, &c. or goods sold, &c. will be good, without setting forth the special agreement. (7 Cranch. 299. Bull. N. P. 139.)

#### COMMON MONEY COUNTS.

For money  
lent.

For so much money, by the said P, before then, lent and advanced to the said D, at his request.

For so much money, by the said P, before then Money paid,  
paid, laid out and expended, for the use of the said &c.  
D, at his request.

For so much money, by the said D, before then Money had  
had and received, to and for the use of the said P. and received.

Of the action for money lent and advanced, generally, vide ante, 80, 81. Of the action for money paid, &c. vide ante, 78, 79, 80. Of the action for money had and received, vide ante, 68 to 78.

When the common money counts are proper, upon bills of exchange and promissory notes, vide ante, 127, 8, also ante, 367, 8, 9.

*On an account stated, or balance struck upon settlement.*

That the said P and the said D, on, &c. accounted together, of and concerning divers accounts and sums of money, from the said D to the said P, before then due and owing, and then in arrear and unpaid; and, upon such accounting, the said D was then found in arrear, and indebted to the said P in the sum of fifty dollars.

Where your claim is under several of the above common counts, instead of giving them the appearance of distinct and separate counts, in your declaration, you may consolidate them all in one, and recover whatever you can prove under all, or any one of them, thus :

That on, &c. the said D was indebted to the said P, in two hundred dollars, for the work and labour of the said P before then performed, for the said D, and at his request, and for goods, wares, and merchandize, by the said P, before then sold and delivered to the said D, at his request; and for money by the said P before then lent and advanced, to the said D, at his request; and for other money, by the said P, before then paid, laid out and expended; by the said P, to and for the use of the said D, at his request; and for other money by the said D, before then had and received, to and for the use of the said P, (and so on, with a count for use and occupation, a balance struck, &c. &c.)

That this may be done, vide 4 John. 280. 13 id. 483.

If the action of assumpsit be brought by a *surviving creditor*, (vid. ante, 305;) or against a *surviving debtor*, (vid. ante, 306;) by or against *husband and wife*, (vid. ante, 305, 6, 7;) for

a debt or demand due before marriage ; by assignees of an insolvent debtor, (vid. ante, 305 ; ) or by an executor or administrator. (vid. ante, 305 ; ) instead of alledging, *that the defendant promised, (or was indebted to) the plaintiff*, the declaration should be varied according to the fact. Thus, in an action by a surviving creditor, it must be stated *that the said defendant promised, (or was indebted to) the said A and B, whom the said A hath survived : by husband and wife, that the said defendant promised, (or was indebted to) the said A, while sole and unmarried : by assignees, &c. that the said defendant promised, (or was indebted to) the said C, before the said assignment to the said A and B, the plaintiffs, (which assignment, together with the proceedings, which led thereto, are to be previously set forth ; ) by an executor or administrator, that the said defendant promised, (or was indebted to) the said E F, deceased, in his life time.* And the breach is, *that the defendant refused to perform his promise, (negating the performance according to the fact, or to pay to) the said A and B, in the life time of the said B : or to perform his promise, &c. (or to pay to) the said A, since the death of the said B, whom the said A hath survived : to perform his promise, &c. (or pay to) the said A, while sole and unmarried, or to perform his, &c. (or to pay to) the said A and B, since their intermarriage : to perform his promise, &c. (or pay to) the said C, before the said assignment, or to perform his promise, &c. (or pay to) the said A and B, since the said assignment : to perform, &c. (or pay to) the said E F, deceased, and to perform, &c. (or pay to) the said executor, (or administrator,) since his death, &c.*

And so where the action is against a surviving debtor, the promise, or debt, is charged, as having been made by (or due from) the said C and D, whom the said C hath survived, and the refusal to perform, or pay, is charged upon the said C and D, during the life time of the said D, and by the said C, since his death.

Where the action is against husband and wife, the promise or debt is charged upon the wife, while sole, and the breach is alledged, of her, while sole, and of her and her husband, since the intermarriage between them. And so of the like cases.

In these cases, the forms of stating the contract, or indebtedness, are the same as we have given above, with this difference only : it must appear to have arisen or existed, between other parties, according to the fact, and the declaration must also show, that the present plaintiff has the right to sue, in his present character ; or that the present defendant is liable to be sued in the character, in which he is brought before the court.



If, however, there have been an actual promise to the party suing, it is proper, and in many cases indispensably necessary, to state such promise to be made by the defendant to him in his character of survivor or representative, &c. Thus, suppose I hold a claim on simple contract, as executor against you, which is of more than 6 years standing, and is therefore barred by the statute of limitations, but you have made an acknowledgment or promise to me as executor, *within 6 years*, which (as we have seen, ante, 26,) will do away the bar arising from lapse of time; I must state your promise to me, in the declaration, in order to prevent the effect of your bar, for I cannot reply this to your plea of the statute, and thereby sustain my action, and, if an issue be joined on a promise, within six years, made to the testator, I cannot give your promise to me in evidence, and consequently, if I omit to state your promise to me in the declaration, your bar will be good, and I must fail, on account of the omission. And so, if you had, in such case, taken the benefit of the insolvent act, but had afterwards promised me, as executor, to pay me the debt, which would revive your liability, notwithstanding your discharge, (vid. ante, 26;) yet I must state your promise to me, *directly*, in my representative character, or the omission will be fatal, as in the former case, and so, of an assignee of an insolvent, a surviving creditor, &c. &c. (Vid. 3 East 409. Willes, 29. 2 Str. 890. Ld. Raym. 1101.)

Where the plaintiff declares, as *executor or administrator*, it is necessary in point of form, to make a profert of the letters *testamentary*, or letters of *administration*, granted by the surrogate or judge of probate. This is usually done, at the close of the declaration, thus :

*Form of a profert of letters testamentary.*

And the said P brings into court here, the letters testamentary of the said A, deceased, whereby it appears, that the said P is executor of the last will and testament, of the said A, deceased.

*Of letters of administration.*

And the said P brings, &c. the letters of administration, of G P, Esq. surrogate of the county of Saratoga, by which it appears, that the said P is administrator as aforesaid.

The making profert, or exhibiting these letters, is, in order that the defendant may see, and be satisfied, that the plaintiff has a right to sue in the character which he assumes. Of profert and oyer, generally, (vid. ante, 339, note (1) 12 John. 401.)

A REVIEW OF THE POINTS DECIDED UPON CERTIORARI, IN RELATION TO A DECLARATION IN A JUSTICE'S COURT, IN THE ACTION OF ASSUMPSIT.

A declaration in assumpsit may be demurred to, for not stating a day. (14 John. 369.)

So, for not stating a request. And, accordingly, where a declaration was for work and labour, goods sold, money paid, &c. and services, as a physician, without averring a *request*, by the defendant, (as we have uniformly done, in the like cases, in the forms which we have given,) the defendant demurred, and because the justice overruled the demurrer, the judgment reversed, (*for this and other causes.*) id.

And it seems, that, to declare for work and labour, without alledging, that it is was done *for the defendant*, would be bad, on demurrer. (1 John. 276.)

But, unless the objection be taken by demurrer, a judgment for the plaintiff thereupon, will be sustained on certiorari, for the Supreme Court will intend, that the want of such averment, was supplied by proof on the trial. (id.)

The declaration, on a special agreement, was utterly uncertain, being as follows : " for damages, on account of the defendant's not fulfilling a contract for a certain lot of land, lying in *German Flats.*" Though this would clearly have been bad, on demurrer, yet it was holden well, after a judgment thereupon for the plaintiff, in the court below, it not having been there objected to ; and every defect was intended to have been supplied by proof. (3 Caines, 219.)

The plaintiff may state, generally, that the defendant is indebted to him, and exhibit his account, and this shall be deemed a part of his declaration, and will aid in rendering it more certain. (id. 187.)

And if such account exceed \$1,25, and appear, on its face, to be for tavern expenses, the judgment will, for that reason, be reversed, unless the plaintiff also show, that the defendant was either a traveller or a lodger in his house. (id. 187.)

Where the declaration was " for work and labour, in burning three hundred bushels of lime," omitting both the usual averments, that it was " done for the defendant " and " at his request," though the declaration would have been bad, if objected to by demurrer. (14 John. 369 ; ) yet this not being

done, on certiorari, the averments were intended to have been supplied by proof at the trial. (2 John. 210.)

Even where a count for *fraud*, and a count upon *contract*, were joined in the same declaration, and the defendant pleaded and went to trial, instead of demurring, it was holden that this cured the defect in the declaration. (3 John. 436.)

The plaintiff, by way of declaration, stated to the justice, without writing, that he "claimed a certain book account, and also for a settlement of four several notes, which the defendant had received from him to collect, and, that his principal object in the action, was, a settlement of the notes, which the defendant had detained against good faith, to the plaintiff's damage, \$25." Although this declaration was very uncertain, in not stating the amount of the notes, nor whether the defendant had collected, or converted the notes, or lost, or otherwise disposed of them, yet, after verdict and judgment, in the court below, as the defendant had not demurred, but had pleaded, and gone to trial, all these averments were intended, on certiorari, to have been supplied by proof at the trial. (9 John. 366.)

Where the plaintiff declares, in different counts, for the sum of \$25, so as in the whole to exceed the jurisdiction of the justice, he ought, (it seems) regularly to show in his declaration, the proper credit, to reduce the sum within that jurisdiction, but if no objection be made, on this account, at the time of declaring, this will cure the defect. (1 John. cas. 333.)

But such a declaration will be even good, upon demurrer, if the claim of damages at the conclusion, be within the jurisdiction of the court. (id. 25, 333. 3 Caines, 174.)

A written promise to pay, founded on a past consideration, was alledged, without stating such consideration, to have been on request, which would have been clearly bad on demurrer. (Ante, 26, 376 ;) yet, where the declaration was not demurred to for this reason, but the defendant pleaded to issue, and went on to trial, the defect was holden to be cured by his so doing, and the Supreme Court, on certiorari, intended a request from the beneficial nature of the consideration appearing upon the return. (10 John. 243.)

If the plaintiff alledge, that he let the defendant have a horse, in consideration whereof the defendant let him have another, it shows, with sufficient certainty, an exchange and not a bailment. (3 Caines, 152.)

## SECONDLY. DECLARATIONS IN TRESPASS ON THE CASE, PROPERLY SO CALLED.

*Against an attorney for negligence in not putting a note in suit.*

That the said P, on, &c. delivered to the said D, a promissory note, dated the 10th May, 1819, for \$70, made by one L H, payable to the said P, to be collected by the said D, as an attorney, who then received the same for the purpose aforesaid. That during one year, after the said note was so delivered and received, as aforesaid, the said L H, was residing within the state of New-York, to wit, at the town of Saratoga Springs, in the county of Saratoga, and during all that time, was amenable to process, and might have been sued and arrested by virtue of process, issued upon the said note. Yet the said D, well knowing the premises, carelessly and negligently omitted to issue any kind of process upon the said note, or otherwise to cause the same note to be put in suit, during the said year, or at any time since, and the said L H, has failed in his circumstances and become insolvent. And the said P avers, that through the said mere carelessness and negligence of the said D, the said note has become, and is, wholly lost to the said P.

*For fraud in the exchange of horses.*

That, on, &c. the said P bargained with the said D, to exchange with him a horse of the said P, for a horse of the said D, and to pay the said D \$20, as, and for the difference in price of the said horses, on the said exchange, being, in the whole, a good and sound price for the said D's said horse, and the said D, then well knowing his said horse to be unsound and unfit for use, falsely and fraudulently affirmed to the said P, that the said D's said horse was sound for any thing he knew to the contrary; and thereby, falsely and fraudulently exchanged his said horse, for the said P's said horse, and \$20, as aforesaid; and the horse of the said D, at the time of the said exchange thereof, was unsound, and unfit for use, and hath so ever since remained.

*On a sale, for a fraudulent concealment.*

That, on, &c. the said P bought of the said D, his certain horse, for the sum of \$70, then paid therefor, the said P to risk the soundness of the said horse, and the said D, well knowing the said horse to have the heaves, which fact was then unknown to the said P, he, she said D, then falsely and fraudulently concealed the said fact, from the knowledge of the said P, and, thereby, sold the said horse to him, for the price aforesaid; and induced the said P, to agree with the said D, to risk the soundness of the said horse, as aforesaid. And the



said horse of the said D in fact, at the time of the said sale thereof, had the heaves, and was thereby rendered, and so hath since continued, utterly unfit for use.

I have drawn this last declaration, on the authority of *Melish v. Motteux*, (Peak. cas. 115,) wherein lord *Kenyon* decided, that the seller of a ship, is bound to disclose to the buyer, all latent defects, known to such seller.

A similar count was, however, afterwards introduced into the declaration, in *Baglehole v. Walters*, (3 Campb. Rep. 154 ;) and attempted to be supported by evidence of mere *fraudulent concealment*, unaccompanied with any *positive* act of fraud, as was before done, in the case reported by *Peake*.—But LD. ELLENBOROUGH, who tried the last cause, declared that he could not subscribe to the doctrine, in *Melish v. Motteux*, and his lordship remarks: “where an article is sold with all faults, I think it is quite immaterial how many belonged to it, within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is, to put the purchaser on his guard, and to throw upon him the burthen of examining all faults, both secret and apparent. I may be possessed of a horse, I know to have many faults, and I wish to get rid of him, for whatever sum he will fetch. I desire my servant to dispose of him, and instead of giving a warranty of soundness, to sell him with all faults.—Having thus laboriously freed myself from responsibility, am I to be liable, if it be afterwards discovered, that the horse was unsound? Why did not the purchaser examine him in the market, when exposed to sale? By acceding to buy the horse with all faults, he takes upon himself, the risk of latent or secret faults, and calculates, accordingly, the price which he gives.—It would be most inconvenient and unjust, if men could not, by using the strongest terms, which language affords, obviate disputes concerning the quality of the goods, which they sell. In a contract such as this, I think there is no fraud, unless the seller, by positive means, renders it impossible for the purchaser to detect latent faults, and I make no doubt, this will be held as law, when the question comes to be deliberately discussed in any court of justice.”

In a subsequent case, (*Dawes v. King*, 1 Starkie's Rep. 75,) the same judge decided, where the plaintiff proved in case for deceit in the sale of an annuity, due from one *Bradshaw*, that the defendant represented *Bradshaw*, to be in good circumstances, and a man of large property, when, in fact, he was in confinement, for debt, and had been in that situation for some time be-

fore, that the plaintiff must go farther in order to prove his case and show that the false representation, or deceit, was practiced for the purpose of putting the party off his guard, and preventing him from being watchful, and he non-suited the plaintiff, refusing even to submit the question to the jury, although he admitted that a plain deceit was proved.

But how do these cases agree with a subsequent one, decided by his Lordship? I allude to the case of *Hill v. Gray*. (1 Starkie's Rep. 434.)

That was an action for £1000, the price of a picture, which the defendant had bid for the same, at auction. The defendant bid this amount, under a belief, not only that the picture was the work of *Claude*, (*which was really the case*,) but that it was also the property of Sir *Felix Agar*, (*which was a mistake*).—And the plaintiff's agent, who had instructions to conceal the name of the owner, though he saw that the defendant laboured under this misapprehension, neglected to undeceive him, and suffered him to purchase under this erroneous impression.—After the sale, the defendant refused to receive the picture on the single ground, that it was not a genuine *Claude*; and, although the plaintiff offered to prove that it *was so*, by the testimony of the most eminent artists, yet, per LD. ELLENBOROUGH: “Although it was the finest picture that *Claude* ever painted, it must not be sold under a deception. The agent ought cautiously to have adhered to his original stipulation, that he should not communicate the name of the proprietor, and not to have let in a suspicion on the part of the purchaser, which he knew enhanced the price. He saw that the defendant had fallen into a delusion, in supposing the picture to be Sir *Felix Agar's*, and yet he did not remove it.” His Lordship was accordingly of opinion that the contract was void, because as he remarked, “the purchaser laboured under a deception, in which the agent permitted him to remain, on a point, which he thought material to influence his judgment.”

Place this last decision of LD. ELLENBOROUGH, with the case of *Meish and Motteux*, and the fine strain of moral reasoning in the charge of Judge Hall, (ante, 178, 9,) in the scale, against his Lordship's laboured argument in favour of the *suppressio veri*, exhibited in *Buglehole v. Walters*, and that rigor of construction in *Laure v. King*, which, if adhered to, would almost shut the door of justice, against the punishment of positive fraud, and I leave it with the American philanthropist to say, which view of this question ought to determine the preponderance.

I am happy to find his lordship, in *Baglehole v. Walters*, disappointed in the expectation he there indulged with so much confidence, that his opinion, expressed in that case, would be holden as law, whenever it should come to be deliberately discussed in a court of justice. Such a discussion has taken place with us, and, though the point was not directly determined, yet we have enough to remove all doubt as to what *will be the reasoning* of our tribunals, when it *shall be presented*, as a turning question in the controversy.

The report of *Fleming v. Slocum*, 18 John. 403, contains the following remarks, on this subject, being the opinion of the court, as delivered by that upright and able jurist, who has been recently called to preside in the capacity of Chief Justice of our Supreme Court: "As courts of law have concurrent jurisdiction with courts of equity in cases of fraud, it cannot, I think, be doubted, that where it is made to appear that a vendor has been guilty of a *fraudulent concealment of material facts*, to the injury of the vendee, an action at law can be sustained to recover damages. It is, also, a rule of equity as well as of law, that a *suppressio veri*, is equivalent to a *suggestio falsi*; and where either *the suppression of truth*, or the suggestion of what is false, can be proved, in a fact material to the contract, the party injured may have relief against the contract."

In these declarations for a fraud, it is safest to omit the consideration of the contract, for, if stated, the plaintiff would doubtless be holden to strict proof thereof. It may safely be omitted, as was decided in *Barney v. Derwy*, 13 John. 224. In that case, a declaration to the following effect, was determined to be good on special demurrer:

*The best form of a declaration for a fraud in a sale of goods.*

That the said D, on, &c. intending to deceive and defraud the said P, did encourage him to buy a certain bay horse, then in the said D's possession, of the value of one hundred and fifty dollars, and falsely and fraudulently affirmed, that the said horse belonged to him the said D, and thereby caused the said P to buy the said horse, which the said D delivered as his horse, and the said P, confiding in the said D's affirmation, purchased said horse of him, and satisfied him therefor, whereas, in truth, at the time of said affirmation and delivery, the said D was not owner of said horse, and had no right to sell him, but the horse belonged to one T D, and the said D well knew the same, to the said P's damage, &c.

*This declaration may be easily varied to meet the case of any other fraudulent affirmation, or a fraudulent concealment.*

I have given the case of deceit in selling and exchanging horses, as familiar instances. The same form will answer for any other case of deceit in sales.

For this action upon deceit in sales, generally, *vide ante*, 170 to 179.

DECLARATION, for *falsely representing a third person as fit to be trusted.*

That on, &c. one *Richard Roe* applied to the said P, and then requested the said P to sell certain goods, on credit, to the said *Richard Roe*, and the said P being then unacquainted with the circumstances of the said *Richard Roe*, the said D well knowing the premises, and that the said *Richard Roe* was then in bad and insolvent circumstances, and unfit to be trusted with goods on credit, then falsely and fraudulently informed the said P, that he, the said D, knew the said *Richard Roe*, and that he believed him to be good, (thereby meaning, that he believed him to be in good circumstances, and fit to be trusted with goods on credit,) in consequence of which information, the said P, not knowing the contrary, did, afterwards, to wit, on, &c. give credit to the said *Richard Roe*, and did sell to him one cow of the value of twenty-five dollars, on credit, whereas, in truth, at the time of the said information so given as aforesaid, the said *Richard Roe* was in bad and insolvent circumstances, and not fit to be trusted with goods on credit, and in truth, the said D did not believe him to be good, but knew him then to be in bad and insolvent circumstances, and not fit to be trusted with goods on credit, and the said sum of money is now wholly unpaid to the said P, and the said P is likely wholly to lose the same.

On the subject of this action for a fraudulent representation, as to the credit of another, *vide ante*, 179, 80.

*Against a constable for an escape on a warrant.*

That on, &c. one *Richard Roe* was indebted to the said P, in the sum of twenty five dollars, on a certain cause of action, before then accrued to him, and, being so indebted, the said P for the recovery thereof, afterwards, to wit, on, &c. sued and prosecuted out of the court of the people of the state of New-York, before *Philip Green*, Esq. then one of the justices of the peace of the said county, a warrant directed to any constable of the said county, commanding him to take the said *Richard Roe*, and bring him before the said *Philip Green*, to answer the said P,



in a plea of trespass on the case, to his damage of fifty dollars, which said warrant, afterwards, to wit, on, &c. was delivered to the said D, then one of the constables of the said county, to be executed in due form of law. By virtue whereof, afterwards, to wit, on, &c. the said D, then being constable as aforesaid, took and arrested the said *Richard Roe* by his body, and afterwards, on, &c. against the will of the said P, voluntarily suffered the said *Richard Roe* to escape, and go at large, out of his custody, the said D then being constable as aforesaid, the aforesaid debt then and still being wholly unpaid, and the said P is, by reason of the said escape, likely wholly to lose the same, and has already lost the means of recovering his said costs and charges, in and about his said suit.

*Under the allegation of a voluntary escape, a negligent one may be proved.* (2 T. R. 126. Burr. 2814. 1 Saund. 35, n. 1.)

On the subject of this action for an escape, generally, vide ante, 180 to 182.

Where a person is already arrested, and in the custody of the law thereupon, a constable, who has suffered him to escape from a previous arrest, is deprived of the power of reclaiming him. (6 John. 62.)

Leaving the defendant behind, after an arrest, and taking his promise to come on, or to appear before the justice at another time, is a voluntary escape, and the constable cannot retake him. (id. and vide ante, 181.)

*For not arresting the defendant.*

*The same as in the last, down to the delivery of the warrant, and then as follows :*

And, at the time of the delivery of the said precept to the said D, and for more than thirty days afterwards, the said *Richard Roe* was within the said county, and the said D might have taken and arrested him upon the said precept, if he would so have done, whereof he, so being constable as aforesaid, during all that time, had notice ; yet the said D did not, nor would, neither hath he at any time before bringing this suit, taken and arrested the said *Richard Roe*, upon the said precept, as he was thereby commanded, the said P's said debt then and still being wholly unpaid.

Of the action for not serving writs, precepts, &c. vide ante, 180, 81.

*Declaration for the defendant's dog biting the plaintiff's sheep.*

That the said D, on, &c. a certain dog, accustomed to bite sheep, knowingly kept, which dog afterwards, to wit, on the day and year aforesaid (the said dog then being the property of the said D,) so grievously bit twenty sheep of the said P, that ten of them died, and the residue were much injured.

This form, with a little variation, will answer in case, for keeping an ox, &c. accustomed to gore cattle, or any animal accustomed to bite or injure women and children.

For this action at large, vide ante, 182, 3.

*Declaration for a nuisance in erecting a hog-stye near the plaintiff's house.*

That the said P and D were, on, &c. and from thence hitherto have been, and now are, respectively and severally possessed of two certain adjoining lots of land, in the village of, &c. and the said P, with his family, during all the time aforesaid, in a certain dwelling house, near to the said lot of the said D, actually dwelt with his family; and on, &c. the said D, on his lot aforesaid, erected a certain hog-stye, and continued the same, during all the time aforesaid, with certain hogs therein, so near the said dwelling house of the said P, that thereby certain noxious, offensive and unwholesome smells, vapours and stench, during all the time aforesaid, ascended and came upon the said lot, and into the said dwelling house of the said P, and greatly annoyed and incommoded the said P and his family, in their habitation of the same dwelling house, whereby the comfort of the said P, and his family, was greatly diminished, and their health much injured.

Of this action for a nuisance, vide ante, 183, 4, 5.

*For harbouring and concealing the plaintiff's wife.*

That, on, &c. the said P's wife, Mary, without his consent, went away from him, and went to the said D, who, well knowing the premises, received her and kept and concealed her from the said P, from the said day of, &c. until the commencement of this suit, and wholly refused to deliver her to the said P, or to discover her place of residence; but unlawfully entertained and harboured her, during all that time, whereby the said P was, during all that time, and still is, deprived of her society, assistance and service, in and about his domestick affairs.

The same form, with a slight variation, will do for harbouring and detaining the plaintiff's child or servant, whereby he loses their assistance and service, on which subjects, vide ante, 186 to 196.

*Declaration for debauching the plaintiff's daughter and servant.*

That, on, &c. and on divers other days and times, between that day, and the day of the commencement of this suit, the said D debauched and carnally knew Sarah, the said P's daughter, then, and during all the time aforesaid, the daughter and servant of the said P, whereby she became pregnant and sick with child, and so remained and continued for a long space of time, to wit, for nine months, then next following, when she was delivered of the child whereof she was so pregnant, to wit, on, &c. by means of which premises, she the said Sarah, from the day and year first above mentioned; hitherto became, and was unable to perform the necessary affairs and business of the said P, her father and master as aforesaid, and thereby he was, during all that time, deprived of her service, as aforesaid, and was afterwards put to great expense, in and about nursing and taking care of the said Sarah, and in and about the delivery of the said child.

For this action at large, vide ante, 186 to 193.

THIRDLY. DECLARATION IN TROVER.

That the said P, on, &c. was possessed of one gold watch, of the value of fifty dollars as, of his own property, and being so possessed thereof, afterwards, to wit, on, &c. casually lost the same, and the said watch, afterwards, to wit, on, &c. came to the said D's hands and possession by finding. Yet the said D, well knowing the premises, hath not, (although often requested so to do) delivered the said watch to the said P, but afterwards, to wit, on &c. converted and disposed thereof to his own use.

This form is universally applicable, in all the variety of cases where trover lies, for which action, generally, vide ante, 157 to 166.

The *losing* and *finding* is a mere fiction of law, for the ease of declaring, and the defendant is never allowed to traverse or deny these two allegations, or either of them. (Vide ante, 319.)

## 5. DECLARATIONS IN TRESPASS.

*Trespass on lands.*

That on, &c. and on divers other days and times, between that day, and the time of the commencement of this suit, the said D, with force and arms, &c. a certain close of the said P, situate, lying and being in the town of Saratoga Springs, in the said county, abutted and bounded as follows, viz. easterly on lands in the possession of T A, (and so describe the farm or lot which was trespassed upon, in such particular, or particulars, as shall distinguish it from any close upon which the defendant may have a right to enter, in the same town.) broke and entered, and with his feet in walking, and with divers cattle, to wit, horses, hogs, and sheep, trod down and destroyed the grass and herbage there growing, and eat up, trampled upon and destroyed, the corn of the said P, there growing, and other injuries to him then and there did, against the peace of the people of the state of New-York.

The plaintiff may, if he chooses, declare in the general form, which I have given, ante, 323, describing the close as lying in such a town, generally. And this is the usual form in courts of record; because, if from the nature of the defendant's plea, it should become necessary to be more specific, the plaintiff may do this in his *replication*, called a *new assignment*, for which also, vide ante, 324.

But if the plaintiff have the least suspicion, that the defendant will plead a title, either in himself or a third person, as he may do, (2 Caines, 28. 7 John. 273.) the declaration should be full and particular, as much so *in form*, as it is usually drawn in a court of record, and *more particular* in description, not only to preserve the identity of the action, which he is thus driven to commence in the common pleas, upon which the title to the costs depends, but also to avoid another consequence of general pleading, which we shall presently notice, and which might prove fatal to his action. When the cause comes to the common pleas, the defendant is holden strictly to the same plea, which he introduces in the court below. (2 Caines, 28.) And a difficulty may grow out of the pleadings, should the court (as they probably would) hold the plaintiff to the same strictness in adhering to his declaration. For instance, where the plaintiff locates the premises no farther than to state the town, and the defendant has a freehold, or other title to premises, situate in the same town, he may plead that the place in which the trespass was laid to have been committed, was a certain close in the town of *Saratoga Springs*, called and known by the name of D's



*farm*, to which he, the defendant, hath a freehold, or other title, therefore he entered, &c. as he lawfully might do. This plea would, in the common law courts, be got over by the plaintiff in his replication. making, as was before observed, (and vide 1 Chitty's pl. 606 to 609,) a *new assignment*, that is, a more minute specification and description of the land on which the trespass was committed, as ante, 324. But in a justice's court, as soon as the recognizance is drawn and signed by the defendant, or otherwise entered into, in the manner we shall, by and by, notice, the justice is ousted of his jurisdiction, and no farther pleading can be had before him; and a question might arise, whether the common pleas could rightfully permit a new assignment, or more particular description of the place, where the trespass is supposed to have been committed, for it might with great reason be urged, that the defendant has only bound himself to defend an alledged trespass, committed on the land mentioned in the declaration below, and not for any other trespass which may be charged against him; for it must be remembered, that he comes there as it were by his agreement, by which means he gives the Common Pleas jurisdiction as to costs. (Vide Pennington on small causes, 129, 30.)

In the declaration in this action of trespass, if the injury were done to a *house*, then, in lieu of the word *close*, say *house*.

Any other injury, as well as that done to corn and grass, must be set out. I mention them as the most usual. Cutting and carrying away the wood and timber then and there growing, or destroying the fences, fruit trees, driving away horses, cattle, sheep, hogs, &c. &c. or indeed any other specific injury, distinct from the entry, must be mentioned in the declaration.

The above form is universally applicable, whether the defendant himself actually enters, or his agents, servants or cattle, &c. for the law makes it *his entry* and *act*, and it must be so alledged. Thus, a declaration that the defendant's *agent*, *servant*, or *cattle* entered, &c. would be bad, at least as an argumentative allegation, (vide post,) and might be specially demurred to; for all this might be, and yet the defendant have no hand in the business. The *agent* or *servant* might have entered of his own head, in which case the defendant would not be liable, (vide ante, 310,) or the cattle, &c. might have been let out for a certain time to another. It should therefore be alledged, in these cases, that the defendant *himself*, entered and by his cattle, &c. did the injury complained of. (Ante, 205.)

In trespass for cutting, or carrying away wood or timber, if the plaintiff mean to recover *treble* damages, under the statute,

(1 N. R. L. 325,) it is essential that the declaration conclude in this form:

“Contrary to the form of the statute in such case made and provided.” (8 John. 342.)

For this action, generally, vide ante, 197 to 227.

*Declaration for entering the plaintiff's house, &c.*

That the said D, on, &c. with force and arms, the house of the said P, in the town, &c. broke and entered, and the door of him the said P, of the value of ten dollars, then and there broke, tore and despoiled, and other wrongs, &c. (*as in the last.*)

*In trespass for the battery of a servant.*

That the said D, on, &c. with force and arms, &c. made an assault on E F, then, and still being the daughter and servant of the said P, and then beat, bruised, wounded, and ill treated the said E F, insomuch, that by means thereof the said E F, then became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, during all which time, he the said P, lost and was deprived of the service of his said daughter and servant, and of all the benefit and advantage, which might and would otherwise have arisen and accrued to him from such service.

For this action, generally, vide ante, 189, 194, 5.

*For adultery with the plaintiff's wife.*

That the said D, on, &c. and on divers other days and times, between that day and the time of commencing this suit, with force and arms, &c. assaulted and ill treated A B, then, and still being the wife of the said P, and debauched and carnally knew her, whereby he the said P, for a long space of time, to wit, from the day and year first above mentioned, hitherto hath wholly lost and been deprived of the comfort, fellowship, aid and assistance of his said wife in his domestick affairs, and other wrongs to the said P, then did, against the peace, &c.

For this action, generally, vide ante, 186, 7, 8.

*In trespass for taking goods.*

That, on, &c. the said D, with force and arms, &c. certain goods and chattels of the said P, viz. one calf, of the value of five

dollars, one plough of the value of ten dollars, took and carried away, and to his own use converted, against the peace of the people, &c.

For this action, generally, vide ante, 227 to 247.

#### THE CONCLUSION OF A DECLARATION.

- To the damage of the said P, of \$25.

*State this, at 25 or 50 dollars, accordingly as you sue under the 25 or 50 dollar act.*

In the case of wrongs, if the plaintiff sue as survivor, state the wrong as done to P and D, "*whom the said P hath survived,*" and if the action be by, or against *husband and wife*, vary the declaration according to the fact, for it should always appear upon its face, why the wife is joined. (2 Caines 221.)

The above is the universal conclusion, in all actions cognizable before a justice. And, in general, this round sum in damages, stated at the conclusion, is sufficient, without showing more particularly what the damages are. To this rule, however, there are many exceptions, especially in an action for a wrong, which has occasioned the division of *damages* into two kinds: *general* and *special*. *General* damages, are such as the law implies to have accrued from the wrong complained of, and may be recovered under the above general conclusion. *Special* damages, are such as *really* took place, and are not implied by law. The latter may arise as the consequence of some act, from which the law implies damage, or they may be the very foundation of the action; but in both instances, it is necessary to show particularly by the declaration, how they arose, and to trace them from the injury complained of. Thus, in an action of trespass for taking a horse, by which the plaintiff is damaged, amongst other causes, by being put to expense, or paying money in order to regain the possession; if he merely state the trespass in the taking, and conclude in *general* damages for so much, he cannot recover the money thus laid out, but it is necessary to state particularly in his declaration, *that by reason of the trespass he was obliged to pay a sum of money, (stating an amount sufficient to cover his expense,) in order to regain the possession of his said horse; for the law will not imply, nor can any body see this, from the mere act of wrongful taking; and it should therefore be stated with the circumstance of time and place, the same as any other material fact, in order that the defendant may be prepared to meet such a charge. Else the plaintiff can recover no more than his general damages. (Holt, 700. Cowp. 418. 8 T. R. 133.) And so of the like cases.*

But under the *general allegation* in an action of trespass. "*and other wrongs then and there did, &c.*" some matters may be given in evidence, in aggravation of damages, though not specified in any part of the declaration. (Bull. N. P. 89. Holt, 699.) With this view, in trespass, for breaking and entering his house, the plaintiff may show the debauching his daughter, or the battery of his servants under that allegation. (*id.* & 6 Mod. 127 ;) but not the loss of their service for that reason, or any other matter, which would in itself sustain an action ; for then it should be stated specially. And, therefore, in trespass for entering the close, the plaintiff could not under this general allegation, give evidence of taking away a horse, &c. (Bull. N. P. 89. Holt, 700. 1 Salk. 643. 1 Str. 61. 1 Sid. 225.)

But when the law does not necessarily imply, that the plaintiff sustained damage by the act complained of, it is *essential* to the validity of the declaration, that the resulting damage should be shown with particularity ; as in an action by a master for beating his servant, in which the allegation of a loss of service by reason thereof, or expense in the cure, &c. are material. (9 Co. 113. a. 1 Saund. 346. a. b. n. 2. 2 East, 154 ; and *vid.* farther, ante, 189, 90.)

#### OF THE USE OF SEVERAL COUNTS IN A DECLARATION.

A declaration may consist of as many different counts as the case requires, and the damages which the plaintiff recovers, may be either a round sum upon the whole declaration, or so much under one count, and so much under another in distinct sums. (Per De Grey, Ch. J. 3 Wils. 185.) And it is usual, particularly in *assumpsit*, and actions on the case, to set forth the plaintiff's action in various shapes, in different counts, so that if the plaintiff fail in the proof of one count, he may succeed on another. (3 Bl. Com. 294, 5.) Thus, in a special action of *assumpsit*, for not doing some act, which the defendant has engaged to do, if the defendant promised to do it upon a particular day, the first count is framed accordingly, but for fear the plaintiff should not be able to prove such particular promise, it is usual, where the evidence may probably support the allegations, to add a count to do it on request, another, to do it in a reasonable time, and another, to do it generally ; and so if it be to do the act, at particular time and place, the first count is to be adapted to such facts, and the second to deliver on request, or generally, and the third within a reasonable time ; and it is frequently advisable to declare in different counts, the one on an executory, the other on an executed consideration, the first to admit of evidence of the defendant's stipulation, at the time of



the inception of the contract, the other of subsequent admissions or promises. (Vid. Chitty on pl. 391, 2, and authorities there cited.) For the reason given, (ante, 374, 5,) it is also, many times, advisable to add a count containing a promise directly to an executor, administrator, &c. besides the usual one, stating the original promise, in order to avoid a plea of the statute of limitations, insolvency, &c. And so in a great variety of cases, it is prudent for the plaintiff to diversify his counts in actions upon contract.

In declaration for *wrongs*, several counts for the same cause of action, are also frequently advisable. Thus, in trespass for entering the plaintiff's close, if there have been a taking and carrying away of personal property, it is usual to insert two counts; in the first, charging an injury to the land, and taking the goods there, and in the second, charging merely the asportation of the goods; and where there has been an asportation of personal property, (which in case of roots, earth, timber or other matter affixed to the freehold, must be an actual carrying away, vide ante, 157, 227,) from the land where the same was dug or cut, &c. and not a mere conveyance of it to another part of the premises, where the same was dug, cut, &c. it is expedient to join the two counts, one for *entering the close*, &c. and the other simply for *taking and carrying away* the personal property; and so of any cases which may arise, where it is doubtful which of several modes of declaring, the proof will sustain, several counts should be incorporated in the same declaration, in order to meet the proof in the several possible shapes, in which it is expected. (Vid. 1 Chitty's pl. 393, 4, and the authorities there cited.)

These counts are in the nature of distinct declarations, and each must, in itself, therefore, independently, contain all the necessary allegations to sustain an action, either in its own terms, or by express reference to a former count. (Bac. Ab. pleas and pleading. (B) 1.)

As to the class of counts which may be properly joined, vide ante, 310, 11, 12.

Upon the whole, if the cause pass on to a hearing, and judgment for the plaintiff, *without* objection to the declaration, in examining it upon certiorari, (whatever nicety herein may be exacted while the parties are in the court below) it is difficult to conceive of a case, as we have seen by the authorities, to which we have from time to time adverted, in which it appears from the return that the merits have been fairly tried, where any defect whatever, in the declaration, would operate as the cause of a reversal. (Vide

also 2 Bos. & Pull. 259, 60, per LD. ELDON, as to the question, how far declarations will be aided by verdict, even in courts of record.) And, though, where the declaration, (none of the evidence being returned,) was, that the defendant "*privily, wilfully and maliciously, by certain conduct, damaged the plaintiff to the amount of \$25,*" the judgment was reversed, on account of its palpable defects in almost every thing; yet, even in this case, where it did not appear what the cause of action was, or whether it might not have been slander, or some other matter, of which the justice had no jurisdiction, the court intimate that, had the evidence been returned, and it had thereby appeared to have been properly within the justice's jurisdiction, &c. the decision would have been otherwise. (1 Caines, 486.) So, the judgment was reversed, where husband and wife were joined, without any reason appearing therefor in the declaration. (2 Caines, 221.) But it would probably have been otherwise, had the reason appeared merely from the evidence returned.

There can be little doubt, however, that, since the introduction of appeals, such extreme laxity would be fatal to the plaintiff's action, at some stage of its progress through the court of Common Pleas.

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SECTION X.

OF PLEAS.

After the plaintiff has put in his declaration, the next step is, the exhibition of the plea, or defence, set up on the part of the defendant. This plea is, either 1. *in abatement*: or 2. *in bar*. The distinction between them is this: Whenever the matter pleaded, merely defeats the present proceeding, by questioning its form, or other thing in relation thereto, which, though available, would leave the plaintiff free to commence another action for the same cause, this should be pleaded in *abatement*: but a plea which shows that the plaintiff cannot, at any time, maintain his action, is a plea in *bar*. Thus, that there are others, who ought to be joined with the defendant, in an action on contract, or that the defendant has before brought an action in a justice's court against the plaintiff, in which the latter is bound to set off the demand for which he sues, is a plea in *abatement*: because, it only questions the form of the plaintiff's proceeding in the first instance, or shows that his action is pre-

mature in the last, and, though the plea be true, yet he may commence his action anew. But a plea, denying the plaintiff's declaration, or a plea of a release, showing that the plaintiff never can sustain his action, is a plea in bar. (For this distinction, vide 4 T. R. 227. Bac Ab. abatement. (N.) Com. Dig. abatement. (B.)

### 1. Of pleas in abatement.

These may be, first, TO THE JURISDICTION OF THE COURT; as that the accounts of both parties exceed \$200, under the \$25 act, or \$400, under the \$50 act. (12 John. 205.)

SECONDLY. TO THE DISABILITY OF THE PERSON OF THE PLAINTIFF, showing that he is incapable of commencing or continuing his suit; as, that he is a fictitious person, or dead, or died pending the suit. But this last cause will not abate the suit, if there be more than one plaintiff, and the cause of action survive, as we have seen is generally the case: (ante, 305, 308,) and so of the defendants, if it survive against one or more of them, as we have also seen, is generally the case in an action on contract, (ante, 306.) The provision, that actions shall not abate on account of death, where the cause of action thus survives, is by statute. (1 N. R. L. 519.) So the defendant may plead in abatement that the plaintiff is an alien enemy; and indeed, this may be pleaded in bar. (10 John. 183.) It must also appear that the plaintiff is resident abroad. (10 John. 70. 2 Gallison, 105, and vid. also, 10 John. 69. 8 T. R. 167. 2 Esp. Rep. 583.) Judgment in favour of the defendant, on a plea of alien enemy will not be a bar to the action on the return of peace, though the plea be in bar. (10 John. 183. 6 Taunt. 237. 11 John. 418.) It is no defence, that the plaintiff sues as trustee for an alien enemy, (6 Taunt. 332, and vid. 6 T. R. 23;) especially if the war be at an end. (2 John. Ch. Rep. 508.) So the defendant may plead in abatement, that the plaintiff is an infant, and has declared by himself, or attorney, (vid. ante, 295, 298;) that the plaintiff is a married woman, or married since the commencement of the suit.— (Vid. on this subject of abatement by disability of the plaintiff, 1 Chitty's pl. 435, 6, & 7, and the cases there cited.)

THIRDLY. TO THE PROCESS AND DECLARATION. The defendant may plead, that both parties being residents of the county where the action is brought, and the defendant not having absconded out of such county, the plaintiff has not brought his action in the town where either of the parties reside, or in the town, village or city, next adjoining the town where either of

the parties reside. 'This plea is given by Laws, (session 41, ch. 94, s. 23. ch. 265, s. 4.)

Other matters in abatement, which relate to the process and declaration, viz. non-joinder and mis-joinder of plaintiffs and defendants, I have already considered, in speaking of the proper parties to the action, and shall not here repeat them. (Vid. ante, 305; 307, as to non-joinder of proper plaintiffs.) And (ante, 306, 310, as to non-joinder of proper defendants.)

Where the plaintiff sues in a particular character, as executor, overseer of the poor, supervisor, assignee, &c. &c. if the defendant means to contest the character in which the plaintiff sues, he must plead specially, that the plaintiff is not overseer, &c. If he pleads the general issue, he admits the character assumed by the plaintiff to be correct. (15 John. 208. 9. 2 Maule & Selw. 553 ;) that this would be proper in abatement, (vid. Com. Dig. Abatement, E. 6.) where it is said, that if suit be brought as by, or against husband and wife, who are not married, this is proper matter in abatement.

FOURTHLY. TO THE PERSON OF THE DEFENDANT. That the defendant is a married woman, at, or after the commencement of the suit, is a proper plea in abatement. But where the husband is civilly dead, as if he be confined to the state prison for life, (1 N. R. L. 411, s. 17 ;) or is an alien enemy, residing abroad, either of these facts may be replied, and will oust the defendant of her plea in abatement. (Vid. 1 Chitty's pl. 437, 8, and the cases there cited.)

OTHER PLEAS TO THE PROCESS, &c. It is also matter in abatement to the process, &c. that it is by summons against a defendant, who is a non-resident of the county where the action is brought. (1 N. R. L. 388, s. 2.) So where it is by warrant, and the defendant is a resident freeholder, or man of a family, and the necessary proof was not made, to entitle the plaintiff to his warrant ; or, if the plaintiff is a non-resident, and the proper security was not given. (id. 388, 9, s. 4.) So where the process was by attachment, issued without the proper proof, or the proper security. (1 N. R. L. 398, s. 23.) but not where it is issued upon proper proof, though it be false or founded in mistake. (Ante 264, 5. 9 John. 130.) Other pleas to the process, &c. are, certain cases of privilege from arrest upon a warrant, or of privilege from the service of other process mentioned, (ante 275, 6, as to privilege from service by summons. &c. 277, 8, 9, & 280, of a warrant, &c.) which we shall by and by notice more particularly.

As to any defect appearing upon the face of the process or return, the proper mode in which to avail yourself of this ad-



vantage is, to state your objection verbally to the justice and move to set aside the proceedings.

As to the cause of abatement, by nonjoinder of the proper defendants, (vid. ante, 306, 310.)

We have also seen, that a plea in abatement, for the cause that the plaintiffs or defendants suing or being sued as husband or wife, are not married, is proper. (Com. Dig. Abatement, E. 6.)

When a misnomer may be pleaded and the effect of a misnomer, (vid. ante, 323. 9.) A defendant cannot plead a misnomer of his co-defendant in abatement. (Lutw. 36.)

**FIFTHLY. PLEAS TO THE ACTION OF THE PROCESS.** A fifth ground for pleading in abatement is, that another action is pending for the same cause, either in a court of record or a justice's court, or, which has the same effect, that the defendant first commenced an action against the plaintiff, in which the plaintiff is compellable to set off the demand disclosed in his declaration. (1 John. 283.) And it makes no difference whether such prior suit by the defendant, was by summons or warrant. (10 John. 233.) But by a late statute, such prior warrant must be served, before it shall be deemed the commencement of a suit. (Laws, session 41, ch. 269, s. 2.) Under certain circumstances, even where such prior suit is duly commenced, a warrant may issue at the suit of the defendant, as we shall notice more at large by and by. (Vide Laws, session 41, ch. 269, s. 1.)

This pendency of another suit can only be pleaded in abatement, (3 John. 259. Com. Dig. abatement, H. 24,) except in a penal action, wherein the pendency of a suit by another person, for the same penalty, may be pleaded in bar. (2 Chit. on pl. 537.) It only applies where the other suit is in the same court, or in another court, deriving its jurisdiction from the same government or authority. (9 John. 221.) A plea, therefore, of an action pending in a foreign country, or in another state, is bad. (12 John. 100. 9 id. 221.) And it has been held, that where the other action was brought in the Circuit Court of the United States in another state, the pendency of the proceedings in that court cannot be pleaded in abatement of an action in this. (12 John. 99.) But where a debt due to the plaintiff, had been attached in the hands of the garnishee, under a foreign attachment in the state of Maryland, by a creditor of the plaintiffs, it was held, that in an action brought by the plaintiffs, against their debtor, the garnishee, in this state, he might plead in abatement the pendency of the foreign attachment in Maryland. (5 John. 101. And vide Salk. 280, pl. 6.) And it seems that the pendency of a suit against a vessel, for a forfeiture, in the District Court, may be pleaded in abatement of an

action of trespass for making the seizure. (3 Wheat. Rep. 247.) A writ of error pending, may be pleaded in abatement to a suit on the judgment; but the plea must state, that the writ of error was brought, before the action was commenced on the judgment, and must show all those steps taken, which are required by law to make it a *supersedeas* of execution. (2 John. Cas. 312. *And when a writ of error shall operate as a supersedeas*, vid. 1 N. R. L. 143, 4, s. 2. 3.) Upon the same principle, where a certiorari is brought on a justice's judgment, its pendency may be pleaded in abatement, to an action upon the judgment, but it must appear, that such certiorari was brought before the suit was commenced: and should the plaintiff have given the security required by the act, (1 N. R. L. 396, s. 7,) to prevent the certiorari operating as a *supersedeas*, this fact might, doubtless, be replied in avoidance of such a plea. (Vide 2 John. Cas. 312. 7 John. 19, 20.)

Where the defendant pleads another action pending, the plaintiff may, before replication to the plea in abatement, discontinue the first suit, and that without leave of the court or payment of costs. (1 John. Cas. 397. S. C. Coleman, 97. But vide 1 Chitty on pl. 443;) by which means he will be enabled to reply, *no such record*, or *no such suit depending*, as the defendant has set forth in his plea, and thus deprive him of the benefit of it.

#### *Of the form of a plea in abatement.*

As this plea professes to question the form or regularity of the plaintiff's proceedings, and goes merely in delay of his remedy, the law exacts the greatest formality and accuracy in framing it. A plea in abatement must not be double; it must be good to every intent, and requires the greatest precision and certainty. (2 Saund. 209. b. 2 John. Cas. 312. Co. Litt. 303. a. 3 T. R. 186. Willes, 42. 3 Wils. 413.) It must show wherein the plaintiff can have a better precept or remedy, or, in the language of the common law courts, must give him better process. (6 Taunt. 595. 4 T. R. 224.) This is a cardinal principle: Thus, if, in an action of assumpsit against A, he plead in abatement the non-joinder of B, as a joint contractor, and the plaintiff take issue upon the plea, and it appear in evidence on the trial, that the contract was made by A, B and C, judgment must be rendered in favour of the plaintiff; for the defendant has not, by his plea, given the plaintiff a better writ. *M Intire v. Simmons*, Cor. Spencer J. N. York sittings, November, 1815.

This plea should also have proper and apt conclusion. (2 Saund. 210. n. 1;) and it is laid down as a general rule,

that a plea in abatement is to be known by its conclusion. (2 John. Cas. 313. But quere. Vide 2 Saund. 209. d. 1 Bac. Ab. 28.) Thus, a plea commencing and concluding in *abatement*, although it contain matter in *bar*, is to be regarded as a plea in *abatement*, (6 l'aunt. 587. 1 Bac. Ab. 27;) and a plea commencing in *abatement*, and containing matter in *abatement*, but concluding in *bar*, is a plea in *bar*, and final judgment shall be given thereon as a plea in *bar*. (2 Saund. 209. d. Ld. Raym. 593. S. C. Saulk. 210, pl. 2. 10 John. 49. 1 East, 636. Com. Dig. pleader, E, 28. Ld. Raym. 1018. 1 Bac. Ab. 27.) But if a plea which contains matter in *bar* of the action conclude in *abatement*, it is a plea in *bar*, notwithstanding the conclusion. (2 Saund. 209. c. 1 Bac. Ab. 28.) So, likewise, a plea which begins in *bar*, though it contain matter in *abatement*, and conclude in *abatement*, is a plea in *bar*, and final judgment shall be given thereupon, as upon a plea in *bar*. (2 Saund. 209. d. Ld. Raym. 694, 1018. 1 Bac. Abr. 27.) These last authorities seem to show, that the rule laid down in 2 John. Cases, 313, that a plea in abatement, is known by its conclusion, is, at least, subject to exceptions.

To illustrate the above rules, giving a character to this plea, suppose a plea to commence thus, "*the defendant prays judgment whether he ought to answer the plaintiff, because he says, &c.*" And then going on, and setting forth a *release*, which is matter in *bar*, should conclude, "*Wherefore he prays judgment, whether he ought to answer the said plaintiff.*" Here the plea begins and concludes as a plea in *abatement*, which relates to the person of the plaintiff or defendant, and for this reason, although it contains matter in *bar*, viz. a *release*, yet it shall be esteemed a plea in *abatement*, and upon a demurrer thereto, a judgment for the plaintiff upon such demurrer would be, that the defendant *answer over* to the plaintiff's declaration, and not, as upon a plea in *bar*, that the plaintiff *do recover* his claim against the defendant; and it is principally in reference to the *judgment*, which we shall hereafter consider, that the above distinctions are considered important. This distinction, however, I have no doubt, must be confined to courts of record. If the matter be in *bar*, whatever the beginning or conclusion in a *justice's court*, the plea must be esteemed in *bar*; and any defect in the beginning or conclusion, which is mere matter of form, (1 Chitty's pl. 289. 14 John. 383) must be taken advantage of by special demurrer. (Vid. 2 John. Cas. 313. 3 T. R. 186. In these last cases, it was said that a formal defect must be objected to by special demurrer, even in a plea in *abatement*.)

Again; should a plea commence as above, in *abatement*, and set forth a non-joinder of a defendant, a co-contractor, which is also matter in *abatement*, but should conclude with praying judgment, "*whether the said plaintiff ought to have and main-*

tain his aforesaid action thereof against him," which is the conclusion of a plea in *bar*, (*vide ante*, 324.) This plea, although it commence as a plea in abatement, and contain matter in abatement, yet, because it concludes in *bar*, it shall be treated as a plea in *bar*, and, on demurrer thereto, a judgment for the plaintiff would be, that *he recover*, and not that the defendant *answer over*, as in a plea in abatement.

The commencement of a plea in *bar* is, "that the plaintiff ought not to have and maintain his aforesaid action thereof against the defendant," (*vide ante*, 324) as we shall see more at large hereafter.

By this brief illustration, the nature, meaning and object of the above rules, determining the character of a plea in abatement, will be understood. They are, to be sure, of no great importance in a justice's court, from the liberality with which a party ought to be allowed to amend his plea in *bar*, if it be really so, even in a judgment against him upon demurrer, which, in effect, allows of an answer over the same as a judgment, upon demurrer, against a plea in abatement; but it is said, that the defendant ought not to be at liberty to amend his plea in abatement, (1 Sell. pract. 275,) and it is the better opinion, perhaps, that the plaintiff need never demur specially to such pleas, but a general demurrer will reach every defect. (2 Manl. and Selw. 485. Ld. Raym. 1015.) Hence the above distinctions may possibly be of occasional use to the justice, as an auxiliary guide to his conduct on the subject of these pleas; as whether a particular plea is a subject of amendment, or its defects reached by a general demurrer, where they are merely defects of form. And again, a plea in *bar*, and a plea in abatement, cannot be pleaded at the same time, and if the defendant plead in abatement and in *bar* at the same time in two several pleas, the plea in *bar* being first, the justice may treat the plea in abatement as a nullity, and it need not be answered. (1 John. cas. 101.) Here, again, the above formal rules may be of use; and so, perhaps, in some other cases. Where a plea has no formal commencement or conclusion, its character must be determined by its matter only. (2 John. cas. 313.) A plea of a misnomer, it is said, must be pleaded in proper person. (2 Saund. 209. b.) There are, however, precedents to the contrary; (*vide* 2 Saund. 209. b. 1 Chitty on pl. 449;) and in Ld. Raym. 509, Holt, Ch. J. was of opinion, that a misnomer pleaded by attorney, was good cause to refuse the plea, but not to demur. A plea to the jurisdiction of the court must also be pleaded in person, and not by attorney. (2 Saund. 209. c. 1 Chitty on pl. 412, 449.) So if a single woman contracts a debt, and afterwards marries, and is sued as a single woman, she must plead her being a married wo-



man in abatement, in person, and not by attorney. (2 Saund. 209. c. 1 Chitty on pl. 412.) But, with these exceptions, pleas in abatement may be pleaded by attorney. (1 Chitty on pl. 449.) Where the defendant is bound to appear in a particular manner, as in case of infants, married woman, sued as such, ideots and lunatics, &c. their pleas, of whatever nature, must, of course, be pleaded and conducted by the person legally authorized to answer for them, (as in the cases mentioned, ante, 290, 1,) and (vide also, 1 Chitty's pl. 449. 2 id. 410.)

*Beginning and conclusion of a plea in abatement.*

1. In pleading to the jurisdiction of the court, the plea begins and concludes, by praying judgment, *if the court will take further cognizance of the suit.* (1 Bac. Ab. 28.)

2. Where the defendant pleads in abatement of the process, a matter apparent on the face of it (as that there is not six days between the test and return of a summons, for instance, he must begin and conclude his plea *by praying judgment of the process, and that the same may be quashed.* (2 Saund. 209. a. d. and vide farther as to the prayer of judgment, id.) But we before mentioned, that the better way to take advantage of the defect appearing in the process or return is, to move to set the same aside. (Ante, 394.)

Where the plea in abatement of the process is founded on some extrinsic matter, such as a misnomer, &c. not appearing on the face of the process, it may commence and conclude in the same way, though the practice is said in strictness to be, merely *to conclude* with praying judgment of the process, &c. (2 Saund. 209. a. d.)

3. In pleading to the person, either of the plaintiff or defendant, the prayer is of judgment *whether the defendant ought to answer, or the plaintiff to be answered*, accordingly as the plea relates to the person of the plaintiff or defendant. (Vide 2 Saund. 209. d. 5 Mod. 144, and vide further 2 Saund. 210. c. 1 Bac. Ab. 28.)

Yet it is said, that a plea of privilege of an attorney (which is a plea to the person) concluding with a prayer, as in a plea to the jurisdiction whether the court will take further cognizance of the suit, is not a nullity, (1 John. cas. 328.) and indeed, such a plea has been adjudged good upon demurrer, (12 East, 544,) and this seems a very appropriate mode of praying judgment in a justice's court, upon a plea in abatement, by an attorney or other officer of the higher courts, where sued in a justice's court; for they are an express exception, while their respective courts

are sitting, in the section which gives a justice jurisdiction. (1 N. R. L. 387, s. 1. and vide 12 East, 544.)

If the death of a party be pleaded in abatement, the defendant must not pray judgment of the process and that the same may be quashed, but if the court will proceed any further; for the writ was in fact abated before, by the death of the party. (3 Lev. 120.)

A plea in abatement must pray the proper judgment, or the court is not bound to give it, as they are upon a plea in bar. (10 East, 87,) and unless the proper judgment be prayed, it will be bad on demurrer. (3 T. R. 185.)

Pleas in abatement are not amendable, because they are dilatory, and do not go to the merits of the action. (1 Sell. pract. 275.) But yet it would be advisable, where matter in bar is pleaded in abatement, to suffer the party to amend such plea if overruled upon demurrer, and, indeed, such would be the effect of the judgment itself, for the party, in such case, is always bound to answer further.

The plaintiff, moreover, need not point out the particular defect of the plea in abatement, though it be merely formal, as he must do upon demurrer, in other cases, but a general demurrer reaches every defect. (2 Maule and Selw. 485. Ld. Raym. 1015.)

When one plea in abatement is overruled, the defendant may plead another, provided he does not invert the established order of pleading, which is, 1. *To the jurisdiction of the court*, 2. *To the person of the plaintiff*, 3. *To the person of the defendant*, 4. *To the process*. (Vide Dunlap's N. Y. pract. 423, 445.) But the latter plea must not be repugnant to the former. (id. 445. Com. Dig. Abatement, i. 4.) A plea in the 2d, 3d, or 4th order of pleading, waives all the former kinds of pleas in abatement, and a plea in bar waives all right to plead any matter whatever in abatement. (1 John. cas. 101.)

These pleas in abatement, in a justice's court, need not be verified by affidavit. The statute, (1 N. R. L. 524, s. 23,) requiring dilatory pleas to be verified by affidavit, apply to courts of record only. (15 John. 242.)

## FORMS OF PLEAS IN ABATEMENT.

TO THE JURISDICTION OF THE COURT.—*Accounts over \$200.*

Richard Roe, }  
 ad. }  
 James Jackson. }

The said D prays judgment, whether this court here ought to take further cognizance of the action aforesaid, because he says, that the matters in question in the said action, to wit, the claims on the part and behalf of the said P, and the claims on the part and behalf of the said D, in the said action are matters of account respectively, and that the accounts of both the said parties in question in the said action, amount, in the sum total thereof, to two hundred dollars and upwards, to wit, to the sum of three hundred dollars. And this he the said D is ready to verify, &c. Wherefore he prays judgment, whether this court will take any farther cognizance of the said action.

TO THE PROCESS AND DECLARATION.—*Non-joinder of a tenant in common, in trespass for taking, or injuring goods, or chattels.*

The said D prays judgment of the summons in this cause, and that the same may be quashed, because he says, that the said several goods and chattels mentioned in the said declaration, at the time of the said supposed trespass, if any such there were, were the proper goods and chattels of the said P, and one *John Stiles*, and not of the said P alone; and that the said P and the said *John Stiles* then possessed the same goods and chattels, as tenants in common, which said *John Stiles* is still living, to wit, at the town of *Saratoga Springs*, in the county aforesaid. And this he, the said D, is ready to verify, &c. Wherefore he prays judgment of the said summons, and that the same may be quashed.

The same form will answer in trover, or trespass on the case, for taking or injuring personal property, only substitute the word "*grievance*," or "*grievances*," for "*trespass*," or "*trespasses*."

When the plea in abatement of non-joinder, is to the whole of the action, it is not necessary to plead in abatement both of the process and declaration, though this may be done; but it is sufficient to plead to the process only; but where it is intended to plead in abatement of only part of the process, (which may be done) as if the cause of abatement arise from *some* of the counts in the declaration, or, in the last form, from *some* of the goods being jointly owned by the plaintiff and another, the defendant

must plead in abatement of both. (2 Saund. 210. n. c. and the precedent, 2 Bos. & Pull. 420.)

And an action may be thus abated as to part, and remain good as to the residue, and the defendant may plead in abatement as to part, and demur, or plead in bar to the residue of the process and declaration. The settled rule on this subject is, that where the plaintiff in any action which is cognizable before a justice, demands two things, and it appears from his own showing, that he cannot have an action or better process for one of them, the process shall not abate in the whole, but shall stand for so much as is good; but if it appear, that he has a cause of action for both the things demanded, but the process is not the proper process for one of them, but he may have another action for it, in another form or right, the whole process shall abate. Thus, if executors should bring an action for *breaking the testator's close*, and taking away a certain sum of money, in the testator's life time, though the writ will not lie for breaking the close, (vide ante, 308,) yet it is good for taking away the money. (Vide ante, id.) And again, where the plaintiff brought an action of assumpsit as administrator, and declared in several counts on four several promises, of which three were laid to the intestate, and the fourth was on an *account stated*, or balance struck, between the plaintiff and defendant, of matters in the plaintiff's own right; on demurrer, the court abated the whole action, because the plaintiff could not join a count for moneys due his testator, with a count for money due in his own right. (Vide the cases cited in Dunlap's N. Y. pract. 437, 8)—But in these cases, where the cause for abating the whole writ, grows out of the form of the plaintiff's declaring, whether the question arise upon demurrer, or plea in abatement, the justice may, I think, suffer the plaintiff to amend, as in a misjoinder of action. (Vide ante, 312.) And where the cause of abatement does not appear upon the declaration, but is pleaded by the defendant, and relates to but part of the process and declaration, then, in all cases, a part may abate and the residue stand good. (2 Bos. & Pull. 422, 3.)

If a plea in abatement contain matter which goes in part abatement of the process only, but conclude with a prayer that the whole process may be abated, the court may still abate so much only as the matter pleaded applies to. (2 Saund. 210. d. 2 Bos. & Pull. 422.)

In trespass to personal property—*non-joinder of a joint tenant by the plaintiff, as to part of the goods; and general issue, as to the residue.*

And the said D, as to the taking and carrying away and converting to his own use, the said bed, two blankets, and two pil-



low cases, in the said declaration mentioned, prays judgment of the summons and declaration in this cause, because he says, that the said bed, two blankets, and two pillow cases, at the time of the said supposed trespass, if any such there were, were the proper goods and chattels of the said P, and one *John Stiles*, and not of the said P alone, and that the said P and the said *John Stiles* then possessed the said goods and chattels as joint tenants, which said *John Stiles* is still living, to wit, at, &c. and this he, the said D, is ready to verify, &c. Wherefore, as to the taking and carrying away, and converting to his own use, the said bed, &c. he prays judgment of the said summons and declaration, and that the same may be quashed.

And as to the taking, and carrying away, and converting to his own use, the residue of the goods and chattels in the said declaration mentioned, he the said D, says he is not guilty thereof, in manner and form as the said P hath alledged.

If there be several counts, setting forth the taking, &c. of the same goods and chattels, or other goods and chattels, the allegations in each count may be met in the same way, according to the fact, by pleading in abatement *as to the taking*, &c. in the first count, and the general issue, or other plea in bar, or abatement, as to the *taking*, &c. the residue of the goods in that count, and so in the same manner of the 2d count. designating them in the pleas, 1st, 2d, and 3d counts, &c. to any number.

These forms can easily be adapted to trover, case, &c. and other wrongs to personal property, unaccompanied with force, which are styled, in pleading, *grievances*, instead of *trespasses*.

*Thus, in trover, say :*

And the said D, as to the converting, &c. of the said bed, &c. as mentioned in the said declaration, prays judgment of the said summons, &c. because he says, that at the time of the committing the said supposed grievance, if any such there were, &c. (omitting, in trover and other actions, the allegation that they possessed them as tenants in common, &c. at the time of the grievance, where the action presupposes the goods, &c. out of their possession, when the injury is committed.)

And the general issue, or other plea in bar, as to the converting, &c. of the residue of the said goods and chattels in the said declaration mentioned, may also be pleaded, according to the fact.

TRESPASS ON LANDS—*non-joinder of a tenant in common by the plaintiff.*

The said D prays judgment of the summons and declaration in this cause, and that the same may be quashed, because he says, that the said close was, at the time of the said several supposed trespasses, the close of the said P and one *John Stiles*, and not of the said P alone. And that they then possessed the same as tenants in common. And the said D avers that the said *John Stiles* is still living, to wit, at, &c. and this, &c. Wherefore, &c. (*as in the last.*)

This plea cannot be tried in a justice's court, because it draws the title in question. Nor can it be signed, counter signed, and accompanied with a recognizance, as we shall by and by notice of a plea of title *in bar as a justification*. and thus oust the justice of his jurisdiction. (Vide 1 N. R. L. 390, s. 7.)

The same difficulty, as in trespass, will arise in an *action on the case*, for an injury to real property, as for a nuisance, or suffering fire to burn over the plaintiff's land, &c.

The defendant may, in such case, plead, that at the time of the grievance, &c. the plaintiff was owner of the close with another, who ought to have been joined, which will equally draw the title in question.

These pleas are certainly matter of right, (ante, 307,) and I know of no method in which the justice can get along with them and preserve his jurisdiction, in trespass on lands, &c. unless he proceed, as we recommended him to do, in several other cases of title collaterally arising, (ante, 14, 15, 16,) that is, to proceed with the proof till he sees some colour for the plea, and if none appear, to overrule it as frivolous. But if he sees any ground for it in such case, to dismiss the cause from a farther hearing. (Vide ante, 15, 16, 203, 230.) The qualification of a justice's jurisdiction, which utterly forbids his inquiry into the title of real estate, and the various statutes concerning costs, having their foundation in this provision, are productive of more difficulty and embarrassment both to the lawyer and magistrate, than any other title which relates to a justice's court.

ASSUMPSIT—*non-joinder of a joint promissor.*

(*Pray judgment of the summons or warrant, &c. and say :*)

Because he says, that the said several supposed promises, if any such were made, were made jointly with one *John Stiles*,

and not by the said D only, and the said *John Stiles* is still living, to wit, at, &c. and this, &c. Wherefore, &c. (*as before.*)

If there be several counts in the declaration, for several causes of action, some of which have no foundation in fact, limit your plea in abatement, according to the truth of the case, or you may endanger your whole defence. Thus, suppose a declaration *for work*, which was done for you and another, in one count, and another count for *money lent*, another for *money paid*, &c. which two last charges are false, you should plead thus :

*Non-joinder of co-promissor in the first count, and general issue as to the two last counts.*

The said D, as to the promise mentioned in the first count of the said declaration, prays judgment of the summons and declaration, (*or warrant and declaration according to the fact,*) and that the same may be quashed, because he says, that the said promise in the said first count mentioned, if any such were made, was made jointly with one *John Stiles*, and not by the said D only, which said *John Stiles* is still living, to wit, at, &c. and this he is ready to verify, &c. Wherefore, as to the said promise, mentioned in the first count, he prays judgment of the said summons, (*or warrant*) and declaration, and that the same may be quashed.

And as to the said two last counts of the said declaration, he says, that he did not undertake and promise in manner and form as is therein alledged.

Again, suppose the plaintiff declares against you, in one count, for goods sold and delivered, a part of which goods, you purchased alone, and a part were purchased by you and your partner : If you plead in bar, the plaintiff may go for the whole under this single count. You must, therefore, (in this, and the like cases) plead in abatement as to part of the claim, and in bar as to the residue (if you have a bar.) Thus :

*Non-joinder of co-promissor, as to part, and statute of limitations as to the residue of the same count.*

The said D, as to certain goods, part and parcel of the said goods, wares and merchandize mentioned in the said declaration, viz. (here mention them if you have a bill of particulars, if not say) of the value of \$10, and the sale and delivery thereof, to the said D, and his promise to pay the said P. therefor, as alledged in the said declaration, prays judgment of the warrant and declaration in this cause, and that the same may be quashed, because he says, that the said promise to pay the said P. therefor, if any such were made, was made jointly

with one *John Stiles*, and not by the said *D* only, which said *John Stiles* is still living, to wit, at, &c. and this he is ready to verify, &c. Wherefore, as to the said promise before mentioned, in this plea, he prays judgment of the said warrant and declaration, and that the same may be quashed.

And, as to the residue of the said cause of action in the said declaration mentioned, the said *D* says, that the said *P* ought not to have or maintain his aforesaid action thereof against him, because he says, that he did not undertake and promise, in manner and form as the said *P* has above thereof alleged, at any time within six years next before the commencement of this suit; and this he is ready to verify; wherefore he prays judgment as to the said residue of the said cause of action, and that the said *P* may be barred from having and maintaining his aforesaid action thereof against the said *D*.

In pleading non-joinder to debt on bond, or other sealed instrument, or in covenant thereon, the plea craves oyer of the deed, and sets it forth, and then avers, that the party omitted, sealed and delivered the deed, and not the defendant only, and that the co-obligor, &c. is still living, &c. The formal parts are framed on a similar plan with the above pleas of non-joinder in other cases (Vid. 2 Chitty's pl. 416, and cases there cited.)

The following is the form of craving oyer in all cases: (and that the party has a right to oyer, vide ante, 339.)

*Form of craving oyer, by defendant.*

<p><i>Richard Roe,</i> ads. <i>James Jackson.</i></p>	}	<p>The said <i>D</i> craves oyer of the said deed, in the said declaration mentioned.</p>
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If it is produced, the plea then goes on to say, "*and it is read to him, in these words, viz.* (setting forth the deed *verbatim* and then proceeding thus :) *which being read and heard, the said D says, &c.* (pleading in abatement, or in bar, as suits the defendant's case.) And so, if the plaintiff wishes oyer of a deed pleaded on the part of the defendant, he is entitled to it on a similar demand, and may set it forth as a part of his replication, if he shall deem it necessary. As if the defendant should plead a release, or other sealed instrument in bar.

When non-joinder should be pleaded in abatement, (vide ante, 305, 6, 7, & 310.)



*Misnomer of defendant, in the Christian name.*

Richard Roe, sued  
by the name of } Pray judgment of the process and declar-  
Dick Roe, } ation as before, &c.  
ads.  
James Jackson.

Because he says, that he was named and called by the name of *Richard Roe*, and by the said Christian name of *Richard*, hath always been called and known, without this, that the said Dever was named, called or known, by the Christian name of *Dick*, as the said P has above in declaring supposed.

The above may easily be altered to meet a misnomer of the *sir* name, and so of a misnomer of the plaintiff.

When this plea is proper, (vid. ante, 328, 9.)

Partners must sue and be sued in their names at length, and not the name of their firm. (1 Pennington's Rep. 75. id. 137, Ante, 251.)

Whether misnomer should be pleaded, in proper person, (vide ante, 298.)

Two names, substantially varying in sound in their origin and common use, are esteemed in law different names. (2 Roll. Abr. 135. Palm. 71.)

A defendant may always be sued by the name, which he has signed in dealing with the plaintiff, though but in a single instance. (6 Taunt. 530 ;) and such an act would prove the replication, that he is known by the name signed. (id.)

The omission of *junior* to a name cannot be pleaded, except where there is father and son of the same name. (Com. Dig. abatement, F. 21.)

A plea in abatement is valid, without mentioning any place, as I have done in several of the above pleas. And the omission is not even a defect of form. And, though it do mention a place, which is out of the county where the cause is to be tried, this may be rejected as surplusage, and of course will not render the plea vicious. (Vide 1 Chitty's pl. 446.)

*To a warrant.—That the defendant is a freeholder of the county, and no oath made.*

The said D prays judgment of the warrant in this cause, and that the same may be quashed, because he says, that at the time of suing out the same, he, the said D, was, and still is a freeholder, actually residing in the county of Saratoga, and that the said P, then did, and still does reside in the same county; and that, on applying for the said warrant, neither the said P nor his attorney applying therefor, did prove to the satisfaction of *Philip Green, Esq.* the justice therein named, and who issued the same warrant, either that the said D was about to depart the said county, or that the said P would be in danger of losing his demand, against the said D, for which this suit is brought, unless the process thereof, against the said D, should be by warrant, and this he is ready to verify. Wherefore, he, the said D, prays judgment, and that the said warrant may be quashed.

If the defendant is a man of a family, but not a freeholder, say, "*was and still is a man of a family, actually residing, &c.*" omitting *freeholder*.

If the plaintiff be a non-resident of the county, but omitted the proper proof or security, the above plea may be in the same form, omitting the allegation that the plaintiff is a resident of the county, and adding to the words, "unless the process thereof, against the said D should be by warrant," these words: "nor did the said P, being a non-resident of the said county, tender to the said justice, nor did he, the said justice, receive of the said D, security for any sum, which might be adjudged against him, the said P, in this cause." Or, if no proof of the plaintiff's non-residence have been taken by the justice, instead of the last clause, add the following: "nor did the said D, upon whose application the said warrant was issued, or any other person, either by affidavit or orally on oath, state that he was a non-resident of the said county, or any fact or circumstance, facts or circumstances, showing that he was a non-resident of the said county, or whereby the said justice might the better judge, of the necessity and propriety of issuing the said warrant." (Vid. 1 N. R. L. 388, s. 4. Ante, 255.)

The intendment of the law, (on an issue joined upon this plea) would most probably be, that the warrant was regularly issued by the magistrate, until the contrary be shown by the defendant. So, that if he is not possessed of some evidence negating the fact of its regularity, his plea will be of no avail, unless the plain-

taff admit its truth. (Vid. 8 John. 325. 14 id. 184, per Spencer, J.)

*Plea in abatement.* That the suit is not commenced either in the town in which, or in the town adjoining to the town, in which either party resides. (Vid. sess. 41, ch. 94, s. 23. ch. 265, s. 4.)

(Prayer that the summons, or warrant, as the case is, may be quashed.)

Because he says, that the said P, at the time of the commencement of this suit, resided and had a legal residence in the town of *Hadley*, in the said county; and the said D at the same time, resided, and had a legal residence in the town of *Waterford*, in the said county, and had not absconded out of the said county, and that this suit was brought and commenced in the town *Saratoga Springs*, and the summons (or attachment, if the suit be by summons or attachment, was made returnable in the said town of *Saratoga Springs*, which does not adjoin either the said town of *Hadley* or *Waterford*. And this, &c. Wherefore, &c. (as before.)

This plea arises under the statute (sess. 41. ch. 94, s. 23,) which provides, that all actions to be brought by virtue of the 25 or §50 act, shall be brought in the town where either the plaintiff or defendant shall reside, unless when the defendant hath absconded out of the county, or counties where the said parties, or either of them have a legal residence, provided that nothing in this section contained, shall affect the plaintiff, being a non-resident of the county where such action shall be brought; but by a subsequent act of the same session, (ch. 265, s. 4,) such action may be brought in any town, city or village next adjoining, as well as that in which the plaintiff or defendant shall reside.

*Privilege, as an attorney of the Supreme Court.*

The said D in his proper person, says, that before and at the time of the commencement of this suit, the said D was, and from thence hitherto has been, and still is, one of the attorneys of the Supreme Court of Judicature, of the people of the state of New-York. And, that, at the time of the issuing and service of the summons (or warrant) in this cause, (or at the time of the service, &c.) the said Supreme Court was sitting, to wit, at the Capitol in the city of Albany. Wherefore, he prays judgment, if the court, now here, will, or ought to take farther cognizance of the action aforesaid, depending against him, &c.

This plea may be easily adapted to the case of solicitors, counsel and other officers of this, and other courts. Of this plea in general, vide 1 N. R. L. 387, s. 1. Ante, 277. 2 Chitty's pl. 411. 12. n. (t) and vide also the form of conclusion in 12 East, 544. 1 John. Cas. 328.

This plea is good, though the process be by summons, returnable at a day after the court have arisen, if it be served during the sitting. (15 John. 242.) But an attorney, sued with another, who is not privileged, is not entitled to this plea. (13 John. 252.)

For the last plea generally, vide ante, 12.

Where a summons or attachment is irregularly or improperly served, and there is no time for correcting the error or supplying the defect, by a proper service before the return day, or for any other reason, this is not done, such defect may doubtless be pleaded in abatement, because if the service be imperfect, the process itself, falls to the ground. (Vide the cases noticed ante, 275, 6.) And so, indeed, if the return be defective, unless it can be amended, though the service may have been correct. As to the mode of returning and serving the summons, and the effect thereof, vide ante, 271 to 276; of the return and service of the attachment, vide ante, 281 to 286. Vide also, ante, 286, 7.

And so a warrant abates, where the defendant is absolutely privileged from arrest, as in case of ambassadors, married women, &c. (Vide ante, 277, 8.)

But when the privilege from arrest is merely local, or temporary, the usual course is to move the justice, that the defendant be discharged from the arrest; as in case of militia, parties, jurors, witnesses, &c. And so, where the arrest is on Sunday, or by breaking open doors, &c. (Vide ante 277 to 280.) After being thus discharged, he may, in due time, be arrested again on the same process; for its force is neither extinguished nor impaired by the discharge. The arrest was void: it is as no arrest: "void things are as no things." (22 Vin. 13, pl. 17. 15 John. 157, per Van Ness, J.) And such arrest of a person privileged, being void, the officer is not entitled to his fees. (10 John. 93.)

For the purpose of determining, whether the facts alledged on this motion for a discharge be true or not, the affidavits of the parties may, without doubt, be received for or against the discharge, which is the course in courts of record; or the



justice may examine the parties and others on the usual oath—  
*"To make true answers, &c. to such, &c. touching the defendant's application for a discharge."* (Vide ante, 256.)

Plea in abatement.—*That the plaintiff is a married woman.*

*Pray judgment of the process, and proceed thus :*

Because he says, that the said P before, and at the time of the commencement of this suit, was under coverture of one A B, her husband, which A B is still living : And this he is ready to verify : Wherefore, in as much as the said A B, is not named in the said summons, (or warrant &c.) he prays judgment of the same, and that the same may be quashed.

This is not matter in bar of the action ; but the coverture of a woman, whether plaintiff or defendant, must be pleaded in abatement. (Vide 3 T. R. 631. Com. Dig. pleader, 2. A. 1.) And this a general rule, extending to all cases, either of wrong or contract, (id. & vide 12 John. 218.)

But where the wife sues, or is sued, without the husband, though it be not pleaded in abatement, yet the husband may bring a writ of certiorari for this cause, and reverse the judgment. (3 T. R. 631, 2.)

On this subject, generally, vide ante, 305, & 306, -7, 303, 310.

*Coverture of the defendant.*

*(Pray judgment as before.)*

Because she says, that, on the day of the commencement of this suit, she was covert of one C F, then, and yet her husband. And this, &c. Wherefore, because the said C F is not named in the said summons, &c. (as before.)

PLEAS IN ABATEMENT, TO THE ACTION OF THE PROCESS.

*Another action pending in a justice's court.*

*(Pray judgment of process and declaration, as ante, 404.)*

Because he says, that before the commencement of this suit, viz. on, &c. the said P did sue out against the said D, before J H, Esq. one of the justices of the peace, of the county of Saratoga, a summons in a plea of trespass on the

case, for the same indentical cause of action above set forth in the declaration of the said P, and that the said suit before the said J H, is still pending. And this, &c. Wherefore, &c. (as ante, 403.)

Another suit pending, must always be pleaded in abatement, and not in bar. (3 John. 259.)

*Plea.—A previous suit brought by the defendant, in which the plaintiff is obliged to set off his demand.*

(Pray judgment of the process and declaration, as ante, 404.)

Because he says, that, before the commencement of this suit, to wit, on, &c. the said D did sue out against the said P a summons, in a plea of trespass on the case, for the recovery of a certain demand, due from the said P to the said D, upon contract, before J H, Esq. one of the justices of the peace of the county of Saratoga; and the said suit thereof, is still depending and undetermined. And the said D farther saith, that the cause of action above, in the said declaration set forth, if any such there be, did accrue to the said P, previous to the time of the suing out of the said summons before the said J H. And the said D farther saith, that, in the said summons, so issued by the said J H, the said D alone is named as plaintiff, and the said P alone is named therein as defendant. And this, &c. Wherefore, &c. (as ante, 403.)

This plea grows out of the decision in *Douglass v. Hoag*, (1 John. 283,) by which it was decided that a previous suit on the part of the defendant, in which the plaintiff might set off his demand, might be pleaded in abatement. By a subsequent decision. (10 John. 238,) it was decided, that, whether the second suit were by summons or warrant, makes no difference, even where the defendant takes his warrant upon proof, that the plaintiff is about to abscond; or that there will be danger of losing the debt. This placed it completely in the power of a designing debtor many times to cheat the creditor, out of his debt, or at least, greatly to delay him in its collection; for, according to another set of decisions, (vide ante, 268) the issuing the original process, of whatever kind, was the commencement of the suit, and he had only to sue out his warrant, and hand it over to a constable, who might, through neglect or a secret understanding, keep it in his pocket, and thus harass the creditor with continual pleas in abatement, till the debtor had his full chance of escape. An attempt very like this, was made in *Wentworth v. Barnum*. (10 John. 238.)

Then, to remedy this evil, came the statute, (sess. 41. ch. 269, sec. 1,) reciting the abuses which had arisen, and providing, "That in all cases, where a summons shall be issued, if the defendant shall prove to the satisfaction of any justice of the peace, that he has a demand against the plaintiff, and that he is about to depart from the county, it shall be the duty of the said justice to issue a warrant, directed to any constable of the county, commanding him to apprehend the said plaintiff, and bring him forthwith before him for trial; and said justice shall proceed to hear, try and determine such cause, as if no such summons had been issued."

Section 2d, of the same statute, provides, "That in all cases, where a warrant shall be issued, the suit shall not be considered as commenced, until the actual service of such warrant."

This last section thus renders a warrant an exception to the rule mentioned ante. 268, "that the issuing the process is the commencement of the suit."

The proof, in order to authorize a warrant under the first section of this statute, is to be taken by oath or affidavit, in form like that mentioned ante, 256, 7. It must be by a disinterested witness, since the statute does not otherwise provide, and the plaintiff himself cannot be sworn, as in ordinary cases. (9 John. 75. 10 id. 114. 11 id. 175.) For proof, in law, means legal proof. (id.)

That the above plea must state, that the cause of action, in the suit commenced by the defendant, was upon contract, so as to admit of a set off. (vide 13 John. 210.) Saying in the plea, merely, that it was an action of *trespass on the case*, will not do. This is equivocal, as it may be for breach of a contract, or for a tort. (id.) It should show that the first action was upon contract. (id.)

That this plea must also alledge, that the plaintiff's cause of action accrued to him, anterior to the commencement of the defendant's suit, (vide 7 John. 22.)

*Of the replication to a plea in abatement.*

Replication in case of misnomer, vide ante, 328. To plea of another action pending, vide ante, 396.

If the defendant appear by the name in which he is sued, the plaintiff may reply, *that this estops him to deny, that it is his true name.* (5 Bos. & Pull. 453.) And all the subsequent proceed-

ings against him, may be in that name. (1 Mass. Rep. 76. 2 Str. 1218. 6 T. R. 234, 5, 6. Ante, 328.)

The plaintiff may either deny the plea in abatement, and go to trial upon the issue thus formed, or reply new matter, and, upon an issue, go to trial on this, or he may demur, according to the fact or law of his case. (Vide 1 Chitty's pl. 455.) A demurrer need not be special. (Ante, 400.)

## 2. OF PLEAS IN BAR.

Pleas in bar, the general definition of which has been before given, (ante, 392,) either deny that the plaintiff ever had any cause of action, or admit that he had, and insist that it was determined by some subsequent matter. (a) The most usual in practice are arranged under the following heads :

### A TABLE, PRESENTING A SHORT VIEW OF THE DEFENCES, IN BAR TO ACTIONS, IN A JUSTICE'S COURT.

*N. B.* The letters *e. u. g.* denote that the matter may be given in evidence under the general issue ; and are usually followed by references to the authority, by which its admissibility under that issue is established. The letters *n. e. u. g.* denote, that it is not admissible under that issue ; and are usually followed with the like references, to show that it must be specially pleaded.

#### DEFENCES TO ACTIONS ON CONTRACTS NOT UNDER SEAL.

##### FIRST,

Deny, that there ever was a cause of action :

##### 1.

*Deny, that a sufficient contract was made :*

1. That no contract was, *in fact*, made.

2. Defendant *incapable* to contract, by reason of,

1. Infancy. (b) (*e. u. g.* 1 Chitty's pl. 470. 9 John. 141. 5 id. 152.)

2. Lunacy, drunkenness, &c. (c) (*e. u. g.* 1 Chitty's pl. 470.)

3. Coverture, *at the time* of the contract, (d) but *coverture since making* the contract must be pleaded in abatement. (1 Chitty's pl. 470,) (*e. u. g.* id.)

4. Duress. (e) (*e. u. g.* id.)

(a) 1 Chitty's pl. 465.

(b) Vide ante, 145.

(c) id.

(d) id.

(e) Vide ante, 144, 5.



3. Insufficiency of consideration, (f) (e. u. g. id.) illegality of consideration, (g) (e. u. g. id.) or made under a mistake. (h) (e. u. g.)

4. The act stipulated to be done illegal, (i) or impossible. (e. u. g. 1 Chitty's pl. 471.)

5. The form of the contract insufficient under the statute of frauds, &c. (j) (e. u. g. id.)

## II.

*Admit a sufficient contract, but show that, before breach, there was* (e. u. g. 15 John. 230. 4 Taunt. 165. Mason, 437.)

1. A release. (e. u. g. 1 Chitty's pl. 472. 4 Taunt. 165.)

2. A parol discharge. (e. u. g. 1 Chitty's pl. 471.)

3. Alteration in terms of contract, by consent. (e. u. g. id.)

4. Non-performance, by the plaintiff, of a condition precedent. (k) (e. u. g. id.)

5. Performance of contract. (e. u. g. 1 Chitty's pl. 471. 13 John. 56.)

6. Payment. (e. u. g. id. 11 John. 531. 2 id. 346.)

7. Contract become illegal or impossible to perform. (e. u. g. 1 Chitty's pl. 471.)

## SECOND.

*Admit there once was a cause of action ; but avoid it by subsequent matter, (in general, e. u. g. Vide 5 John. 230. 4 Taunt. 165. Mason, 437.)*

(f) Ante, 26, 7, 38, 39, 40, & 93 to 99.

(g) Ante, 41, 94, 96, 7, 8, & 132 to 145.

(h) Ante, 380.

(i) Ante, 132 to 141.

(j) Ante, 28, 9, 30, also 146 to 155. That this is a proper plea in assumpsit, vide 15 John. 425.

(k) Ante, 23, 4, also ante, 335, 6.

## I.

*Disability of the plaintiff to sue, being,*

1. An alien enemy. (l). (n. u. g. e. 1 Chitty's pl. 473; but it is e. u. g. if the contract were made during the war. id.) (1)
2. An insolvent debtor. (m) (e. u. g. 1 Chitty's pl. 471.)

## II.

*The defendant not liable, being an insolvent debtor.* (e. u. g. 1 N. R. L. 466, s. 12.)

## III.

*Cause of action discharged:*

1. By payment. (e. u. g. 1 Chitty's pl. 472. 11 John. 531.)
2. Accord and satisfaction. (e. u. g. 1 Chitty's pl. 472. 2 John. 156.)
3. Tender. (n. e. u. g. 1 Chitty's pl. 473.)
4. An account stated, and a negotiable security given. (e. u. g. 1 Chitty's pl. 472.)
5. Arbitrament. In pleading this, the defendant need not aver performance of the award, on his part. (11 John. 189.) (e. u. g. 1 Chitty's pl. 472.)
6. Former recovery, or trial, and final judgment upon the same matter. (n. e. u. g. 12 John. 455. 10 id. 111. id. 246.)
7. Judgment, in an action brought by the defendant, against the plaintiff, in which he either did, or ought, to have set off his demand. (n. e. u. g. 12 John. 455. 10 John. 111. id. 246.)
8. Higher security given. (e. u. g. 1 Chitty's pl. 472.)
9. A Release. (e. u. g. id.)

(l) But if not made during war, this must be pleaded in abatement, or in bar, (ante, 393. 1 Chitty's pl. 473.)

So where a married woman suing alone, has no interest in the contract, her coverture is evidence under the general issue, but if she have a right to join in the action, this must, in general, be pleaded in abatement. (Ante, 394. 1 Chitty's pl. 471.)

(l) Ante, 393.

(m) Ante, 305.

10. Statute of limitations.(n. e. u. g. id. 473, 476.)

11. Set off.(n. e. u. g. id. 473, 476.)

N. B. That the rules of admitting evidence under the general issue, are very nearly the same both in *assumpsit*, and debt on simple contract.(Vide 1 Chitty's pl. 476.)

#### DEFENCES TO ACTIONS ON CONTRACTS UNDER SEAL.

##### FIRST.

Deny there ever was a cause of action.

##### I.

No deed in fact made, or that it was delivered as an escrow. ~~2~~  
This plea is technically called *non est factum*.(2) It merely puts the execution of the deed in issue, but admits the other averments in the declaration.(o)

##### II.

Deed invalid.

1. Defendant's incapacity to contract, which includes,

1. Infancy.(p) (n. e. u. g. 1 Chitty's pl. 479. 12 John. 338. 6 Cranch, 219.)

2. Lunacy.(q) (e. u. g. 1 Chitty's pl. 479.)

3. Coverture.(r) e. u. g. id. and 12 John. 338.)

4. Duress.(s) n. e. u. g. 1 Chitty's pl. 479.)

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(2) This is the general issue to an action of debt on specialty. (1 Dunlap's N. Y. Pract. 448.) Where the deed is in itself the foundation of the action, as a bond, or any sealed contract for the payment of money, even though extrinsic facts are mixed with it.(8 John. 82,) *nil debet* is not admissible, if objected to by demurrer; though otherwise, if the plaintiff do not demur. But if the deed be merely inducement, as in debt for rent on an indenture of lease, or on a *gaol bond*, in which the action arises from the subsequent occupation or escape, the defendant may plead *nil debet*, which puts the plaintiff on proof of all the allegations in the declaration, and the defendant may give the same things in evidence, under this general issue, as are admissible under the same plea in an action of debt on simple contract; a release, payment, eviction, &c. (1 Chitty's pl. 477. Vide ante, 230. 11 John. 474.) But in covenant, there is strictly, no general issue, and, in general, all matters of defence must be specially pleaded. (Vide 14 John. 248. 1 Dunlap's N. Y. Pract. 453.)

(o) 10 John. 47. 14 id. 89.

(p) Ante, 145.

(q) id.

(r) id.

(s) Ante, 144, 5.

2. Illegality of consideration or contract ; (e. u. g. id.) but *want*, or *failure* of consideration, or even a *fraud* in the consideration, is no defence at law.(*t*) But if the deed be void by statute, as for usury, gaming, or other cause, this must be pleaded specially.(id. and 12 John. 336.)

3. Deed obtained by fraud. This is no defence to a deed; if it relate merely to the *consideration* of the deed ; but, in order to constitute a defence, the fraud must concern its *execution*, as that the deed was read falsely to an illiterate man, or one deed fraudulently substituted for another.(*u*) (e. u. g. id.)

4. Contract impossible to perform.(n. e. u. g. 1 Chitty's pl. 480.)

### III.

*Admitting that deed was originally valid, excuse of performance.*

1. Erasure, interlineation, &c.(e. u. g. 1 Chitty's pl. 479.)

2. Deed become impossible to perform.(n. e. u. g. 1 Chitty's pl. 480.)

3. Become illegal to perform.(n. e. u. g. id.)

4. That the plaintiff is not damaged, called *non damnificatus*.(n. e. u. g. id.)

5. No award, &c. This is a plea to an *arbitration bond*, that the arbitrators made no award pursuant to the bond, upon which the plaintiff must reply, and set forth an award, assigning a breach.(*v*) (n. e. u. g. id.) So also a demand and refusal of the award, which, by the terms of the bond, is to be ready for delivery by such a day, cannot be given in evidence unless specially pleaded.(10 John. 143.) But the defendant may show, under a plea of no award, that the arbitrators awarded on a matter not submitted to them.(16 John. 227.)

### IV.

*Performance pursuant to the deed.*(n. e. u. g. 1 Chitty's pl. 480.)

1. Payment at the day.(n. e. u. g. id.)

2. Performance, &c.(n. e. u. g. id.)

(*t*) 13 John. 430.

(*u*) 12 John. 337, 13 id. 430.

(*v*) 1 Chitty's pl. 555.



## V.

*It is also a good defence, that the defendant offered to perform, but was prevented by the act of the plaintiff.*(w) (n. e. u. g. id.)

## SECOND.

Admit that the plaintiff had a cause of action, but avoid it by subsequent, or other matter.

## I.

*Disability of the plaintiff to sue.*

1. Alien enemy.(x) (e. u. g. id. 479 ; but n. e. u. g. if plaintiff became so after contract made. id. 473. Ante, 393.)

2. Insolvent debtor.(y) (n. e. u. g.)

## II.

*Cause of action discharged.*

1. By payment after the day.(z) (n. e. u. g. 1 Chitty's pl. 480.)

2. Accord and satisfaction.(a) n. e. u. g. id.)

3. Tender.(n. e. u. g. id.)

4. Arbitrament.(b) n. e. u. g. id.)

5. Former recovery, or trial and final judgment of the same matter on the merits.(n. e. u. g. id.)

6. A former trial and judgment, in which the plaintiff ought, but neglected to set off his demand.(n. e. u. g. id.)

7. Release.(n. e. u. g. id.)

8. Presumptive limitation.(n. e. u. g. id.)

9. Set off.(n. e. u. g. id.)

(w) 13 John. 56.

(x) Ante, 393.

(y) Ante, 395.

(z) 1 N. R. L. 517.

(a) Vide ante, 317.

(b) Ante, 416.

## DEFENCES TO DEBT ON RECORD OR JUDGMENT.

## FIRST.

Deny there ever was any cause of action.

## I.

*Nul tiel record*, i. e. *no such record*. This plea merely puts the record in issue, and prevails, either where there is no record, or one differing from that set forth in pleading. (Com. Dig. pleader, 2. W. 13. Record, C. Str. 1171. 3 Mod. 41.) This is also the only plea, by which the record of a judgment in a foreign state can be put in issue. (7 Cranch, 481. 3 Wheaton, 234.)

## II.

To a judgment in a justice's court, *nil debet*, i. e. *not indebted, &c.*

## SECOND.

Admit there once was a cause of action.

## I.

*Disability of the plaintiff.*

1. Alien enemy. (c) (n. e. u. g. 1 Chitty's pl. 473.)
2. Insolvent debtor. (d) (n. e. u. g.)

## II.

*Defendant not liable to be sued, having been discharged under the insolvent act.* (n. e. u. g.) But to an action on a justice's judgment, (e. u. g.)

## III.

*Matter in discharge.*

1. Payment. (1) (n. e. u. g. 1 Chitty's pl. 481.)
2. Release. (n. e. u. g. id.)
3. Levied by *fieri facias*. (e) (n. e. u. g. id.)
4. Levied by *capias ad satisfaciendum*, i. e. an execution against the body. (n. e. u. g. id.)

(c) Ante, 393.

(d) Ante, 305.

(1) 1 N. R. L. 517.

(e) Vide ante, 221.

5. Levied by execution in a justice's court. (n. e. u. g. a justice's judgment being equivalent to a specialty. (16 John. 233. 1 Hayw. 18. 1 Chitty's pl. 480, 1.)

6. Implied limitations. *This is the only limitation to a justice's judgment.* The statute of limitation cannot be pleaded thereto. (f) (n. e. u. g.)

7. Set off. (n. e. u. g.)

8. Former recovery, or trial and final judgment of the same matter on the merits. (n. e. u. g. 1 Chitty's pl. 481.)

DEFENCES TO ACTIONS ON STATUTES.

FIRST.

*Denial of the fact.*

1. *Nil debet*, i. e. that he is not indebted, or does not owe, &c. (3) This is also a good plea to an action on a gaol bond, for an escape from the liberties. (g)

2. Not guilty. This may sometimes be pleaded to an action of debt on statute, but *nil debet* is the proper plea. (h)

3. Prior action depending for the same offence. (n. e. u. g. 1 Chitty's pl. 481.)

4. Former recovery for the same offence. (i) (n. e. u. g. id.)

5. Under the act to lay a duty on strong liquors, and for regulating inns and taverns. (1 N. R. L. 181, s. 18.) That a recovery has been had for any offence in selling strong liquor, without license, &c. of the like nature with the offence prosecuted for, vide 6 John. 101. 7 id. 134. (n. e. u. g.)

(3) Under this plea, the statute of limitations may be given in evidence. 1 Chitty's pl. 482.

(f) 14 John. 479.

(g) 11 John. 474.

(h) 1 Chitty's pl. 481.

(i) Vide 6 John. 101.

## DEFENCES IN ACTIONS FOR TORTS OR WRONGS.

## I.

*Deny that the defendant is guilty of the wrong complained of.*

1. In trespass on the case properly so called, (4) or trover, (5) not guilty of the premises.

2. In detinue, *non detinet*, i. e. he does not detain, &c. (6)

3. In trespass, not guilty of the trespasses, &c.

## II.

*Justify the act.*

1. In trespass to personal property, distress for doing damage, (j) for rent, &c. (k) (These, and the like defences, are, in general, n. e. u. g. vide 1 Caines, 253. Holt's N. P. Rep. 478, 482. 11 John. 132.) (7)

2. To real property. Title in the defendant, &c. (n. e. u. g. 1 N. R. L. 390. s. 7.) Title in a third person, (n. e. u. g. id.) Right of common, ways, &c. (n. e. u. g. 1 Chitty's pl. 495.) License, &c. by the party, (n. e. u. g. id. 494, 5.)

(4) In all actions of this kind, cognizable before a justice, every matter in bar may be given in evidence under the general issue, except the statute of limitations, and a retaking on fresh suit, in an action against a sheriff, or keeper of a gaol, for an escape. (1 Chitty's pl. 496 to 499. 1 N. R. L. 426, s. 23. Vid. also 1 Starkie, 97. 14 John. 389.)

(5) In this action, all matters may be given in evidence under the general issue, except a release and the statute of limitations. (1 Chitty's pl. 490.)

(6) That the chattels were pledged to the defendant, must be pleaded specially in this action, but any fact to show the property out of the plaintiff, may be given in evidence under the general issue, as that the plaintiff gave it to the defendant, &c. (1 Chitty's pl. 494.)

(7) In this action of trespass to personal property, the defendant may, under the general issue, show property out of the plaintiff; but where the act is, at common law, *prima facie*, a trespass, any matter of justification, or excuse, or done by virtue of a warrant or authority, must, in general, be specially pleaded, (but vide next note (8).) Thus, a justification for cutting ropes, or killing dogs, or taking guns, &c. or a distress for rent, if made off the demised premises, as on a common, or under a fraudulent removal; or a seizure of goods under a by-law, or for *damage fe sant*, &c. must be specially pleaded. (1 Chitty's pl. 492, 3, 4. Vide also 4 Cramp. Rep. 136.) But a distress for rent on the demised premises, may, by statute, (1 N. R. L. 436, s. II,) be given in evidence under the general issue.

(j) Ante, 204 to 213, 239 to 241.

(k) Ante, 228 to 239.



## III.

*Excuse the act.*

1. In trespass, inevitable necessity. (n. e. u. g. 1 Chitty's pl. 495.)
2. Escape of cattle by defect of fences, &c. (l) n. e. u. g. id.)
3. Chasing sheep, intermixed with the plaintiff's, &c. (n. e. u. g. id. 494.)

## SECOND.

Admit that plaintiff *once* had a good cause of action, but that it *was* discharged by,

1. Accord and satisfaction. (n. e. u. g. 1 Chitty's pl. 496.)
2. Arbitrament. (m) (n. e. u. g. id.)
3. Tender of amends, for an involuntary trespass, &c. (n) (n. e. u. g. id.)
4. Former recovery, or a trial and judgment on the merits, for the same cause. (n. e. u. g. id. 12 John. 455. 10 id. 111. id. 246.)
5. Distress for the same cause. (o) (n. e. u. g. id.)
6. Release. (n. e. u. g. id.) N. B. A release, in trespass, by one tenant in common, plaintiff, is a bar to all. (13 John. 286.)
7. Statute of limitations. (n. e. u. g. id.) (8)

(8) A fruitful source of litigation in this, and indeed every country, is to be found in the wrongs committed by, or alledged against *officers*, in the abuse, or discharge of their rights and duties ; as in entering on lands, breaking open buildings, seizing goods, making returns, &c. &c. for which, sometimes, as we have seen, an action of trespass or trover, and sometimes an action on the case, is proper. (Ante, 216 to 226 ; also 180, 1, 2.) And a variety of other persons, as well as a great number and diversity of officers, are authorized, in numerous instances, to do certain acts, by statute, for which similar actions may be, and frequently are brought.

Hence, in order to the more effectual protection of such officers and their assistants, and others acting under the authority of statutes, it is

(l) Ante, 206 to 213.

(m) Ante, 416.

(n) Ante, 201. 1 N. R. L. 524, s.

(o) Ante, 212.

EXPLANATIONS OF THE ABOVE TABLE, IN CERTAIN PARTICULARS;  
NOT ELSEWHERE NOTICED IN THIS TREATISE.

I. From these divisions, we may perceive, that pleas in bar are of two kinds. 1, They *deny* that the plaintiff *ever* had the cause of action complained of : or 2. they admit that he *once* had the cause of action, but insist that it *no longer exists*, on account of some matter alledged in the plea. (p).

II. The defendant, as to most of the matters above marked, as being evidence under the general issue, has his election, either to plead such matter in bar specially, or give it in evidence, as there noted, with the general issue. On this head, the rule, in relation to all matters of defence in bar, is this : matter which denies what the plaintiff would, on the general issue, be bound to prove in the first instance, in support of his action, may and ought to be given in evidence under that plea ; but any ground of defence, which admits the facts alledged in the declaration, but avoids the action by matter, which the plaintiff would not be bound to prove or dispute in the first instance, on the general issue, may be pleaded specially. (q)

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provided, in the "act for the more easy pleading in certain suits," (1 N. R. L. 155,) "That, if any action upon the case, trespass, &c. be brought against any sheriff, coroner, justice of the peace, mayor, recorder or alderman, bailiff, constable, marshal, collector, or overseer of the poor, and their deputies, or any of them, or any other person, who, in their aid or assistance, or by commandment, do any thing touching his or their office, every such person may plead thereunto the general issue, and give the special matter in evidence."

And, farther, "that if any action shall be brought against any person, for taking any distress, making any sale, or any thing done by authority of any statute of this state, the defendant, in every such action, may plead not guilty, and, upon the trial of that issue, the whole matter may be given in evidence by both parties."

By this act, the defendant is also authorized in the cases mentioned by it, in section second, to plead briefly, "that he did the act complained of by the plaintiff, by the authority of" such a statute (generally,) referring to and naming the statute, without being more special ; to which the plaintiff may reply, "that the act complained of, was done by the defendant of his own wrong, without any such cause as the defendant alledges in his plea," and, upon this issue, the parties may go into their proofs at large. But the general issue, is the preferable plea. If the parties undertake to plead in the special form pointed out by this statute, they must adhere strictly to its language, both in the plea and replication, or they will be bad on general demurrer. (15 John. 138.) The above statute, not embracing officers under the act relative to common schools, (14 John. 166,) it was deemed necessary, by a subsequent statute, to extend the same pro-

(p) 1 Chitty's pl. 465.

(q) 1 Chitty's pl. 497. Vide also 10 John. 289. 3 Cranch, 31. 15 John. 425. 2 John. 346.

III. Though the defendant plead, specially, that which amounts to the general issue, the defect is mere form, and objection must be made by special demurrer. (r)

IV. *General issue.*—The form of this plea in the different actions, of which we are treating, is as follows :

Richard Roe, }  
ads. }  
James Jackson. }

*The title of the cause to be varied according to the fact as mentioned ante, 332, & 249, 50, & vide also, ante, 258, under which comes the words of your plea.*

visions to commissioners, trustees and collectors under that act, with their assistants, and to make the action local, as mentioned (ante, 11, 12,) of actions against other officers, &c. (vide sess. 43, ch. 122, s. 2.) The Supreme Court, having also decided, that the same statute did not extend to actions for proceedings, under the militia act, (13 John. 443,) a statute was also passed, extending its provisions to all militia officers. (Laws, sess. 42, ch. 219, s. 30.) These two last statutes, merely authorize the admission of all special matter in evidence under the general issue, without giving any particular form, in which the statutes may be pleaded, or such plea replied to. Similar provisions are contained in a variety of other statutes.

The party who delivers process to the officer, for the purpose of having it executed, is not considered the aid or assistant of the officer within these statutes, and is, consequently, not within their protection. If sued, therefore, he must plead his justification specially, as in other cases. (1 Caines, 253, 11 John. 132.)

Yet it was held, in one case, that where the party does no further act, than merely to deliver his process, (an execution for instance,) to the officer upon, and by force of which *alone*, and not in consequence of any instructions given, the act complained of is done by the officer, this shows the defendant not guilty, and it is, therefore, competent for him to show the delivery and execution of the writ, under these circumstances, upon the general issue. (1 Caines, 253.)

It is a universal rule, applicable to all cases, in all actions, cognizable before a justice, that matter which does not constitute a complete bar of the plaintiff's action, but which merely goes to diminish the amount of his claim to damages, whether such matter arise either before or after the commencement of the suit, (vid. 1 Chitty's pl. 497. Co. Lit. 283. a. 2 Bos. & Pull. 225. 1 John. 47, 52, 3. 11 John. 175,) is proper evidence under the general issue. And I cannot see why this should not be the case under any issue, if such matter arise after the issue is joined in the cause. (Vide 11 John. 175, 6, &c.) Indeed this rule is laid down unqualifiedly in Coke's Lit. 283. a. without regard to the nature of the issue, or the time when the matter arose, or the kind of action, but that wherever the matter cannot be pleaded, there it may be given in evidence.

(r) Com. Dig. pleader, E. 13, 14. 5 Bac. Abr. 372, & vide 10 John. Co. Litt. 303. b. Com. Dig. action 239: 8 Cranch, 31.  
on the case for disturbance. B. 2.

1. *In assumpsit*.—The said D says, that he did not undertake and promise in manner and form as the said P hath above thereof declared against him. (This plea is called in short, *non-assumpsit*.)

2. *In debt, on simple contract*.—Justice's judgment—on statute, on a deed where it is mere inducement to the action, vide ante, 417, n. (2)—That he doth not owe the said sum above demanded, or any part thereof in manner and form as the said P hath above thereof declared, (called *nil debet*.)

3. *In debt on specialty*.—That the said instrument in writing (bond or indenture, &c.) is not his deed, in manner and form &c. (as before,) (called *non est factum*.)

4. *In covenant*—No general issue. (Ante, 417, n. (2.) The denial of the deed, same as in debt on specialty.

5. *In detinue*.—That he doth not detain the said goods and chattels, in the said declaration specified, or any part thereof, in manner, &c. (as before.) (called *non detinet*.)

6. *In trover and trespass on the case, properly so called*.—That he is not guilty of the premises above laid to his charge, in manner, &c. (called *not guilty*.)

7. *In trespass*—That he is not guilty of the trespass, (or trespasses,) above laid, &c. (as in the last.)

V. INFANCY.—Any person under 21 years of age, is an infant.(s) When his simple contracts are void, vide ante, 145. How far he may be a party to a bill or note, vide ante, 88, 9. His contracts under seal are voidable by plea of infancy only. His other contracts executed, as where he exchanges goods, or buys them and pays a sum of money. (except for necessities) are voidable, and the goods, or money delivered, or paid, may be recovered back.(t) So, with the manumission of his slave.(u) The amount of this rule is, that when they come of age, and are capable of considering over again what they have done, they may then either ratify or disaffirm their contracts before executed. But I find no case authorizing them to do this, before they come of age.(v) The only control, I be-

(s) Bac. Abr. tit. infancy & age.

(u) 11 John. 132.

(A)

(v) Vide Bac. Abr. infancy &

(t) id.(I.) 3. 11 John. 132. 6 Mass. Rep. 80.

age.(I.) 3. 11 John. 132, 3.



lieve, which he holds over his contracts, before coming of age, is, either to defend against the enforcement of his unexecuted agreements, or to enforce his contracts against others in the course of a suit ; and this is by suit only ; for he has no power of himself to settle, release, or arbitrate his claims, <sup>(w)</sup> except indeed, that he may arbitrate with the consent of his guardian <sup>(x)</sup> Accordingly, where he contracts to deliver, and the article is taken without his actual delivery, the taker is a trespasser. <sup>(y)</sup> Yet he may insist on a purchase or contract, for his own benefit, as to pay him a debt, deliver him goods, &c. and have an action for the breach thereof, and, if he have received a delivery of the article, he may retain it until he come of age, and then avoid his agreement. We have seen ante, 145, that he may bind himself to pay for *necessaries*, which includes meat, drink, apparel, physick, good teaching, instruction and the like, they being actually necessary, charged at reasonable prices, and suitable to his degree and estate. of which things the justice or jury are to judge. But he cannot bind himself for necessaries in carrying on his trade ; for the law will not entrust him to trade, as it might ruin him ; but necessaries for his wife or lawful child, are necessaries for him.— Even in these cases, he cannot bind himself for any sum certain, or settle and state an account for them, so as to lay the foundation of a suit upon a balance struck, or conclude himself by giving a note or bond ; for the law will consider all such things void, and drive the plaintiff back to his original consideration, and fix the necessaries and the price as they should be. <sup>(z)</sup> We before noticed ante, 145, that when the infant lives with his parent, he is not liable even for necessaries, nor is the parent, in general, liable for such necessaries.

Accordingly, where a son of the defendant, who lived in his family, and was decently clothed according to his father's circumstances, bought a coat at the store of the plaintiff, but there was no evidence of the father's consent to this, and the justice gave judgment for the price against the parent, the Supreme Court reversed the judgment ; and laid down the following doctrine on this subject :

“ A parent is under a natural obligation to furnish necessities for his infant children ; and if the parent neglect that duty, any other person who supplies such necessities, is deemed

<sup>(w)</sup> 6 Mass. rep. 80.

<sup>(x)</sup> 3 Atkyns, 614. 3 Caines, 253.

Comb. 318.

<sup>(y)</sup> Bac. Abr. tit. infancy & age

(1.)

<sup>(z)</sup> id. & vide ante, 145.

to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent. But what is actually necessary, will depend on the precise situation of the infant, and which the party giving the credit, must be acquainted with at his peril. (*Simpson v. Robertson*, 1 Esp. Rep. 17. *Ford v. Fothergill*, id. 211.) In the case of *Bainbridge v. Pickering*, (2 Wm. Black. Rep. 1325,) Gould J. says, with great propriety, "No man shall take upon himself to dictate to a parent what clothing a child shall wear, at what time they shall be purchased, or of whom; all that must be left to the discretion of the father or mother. Where the infant is under the control of the parent, there must be a clear and palpable omission of duty, in that respect, on the part of the parent, in order to authorize any other person to act for, and charge the expense to the parent." (a)

In general, an infant cannot bind himself, even with the consent of his guardian, unless his acts are deemed by a Court of Chancery beneficial to him, (b) but his bond is voidable, even though, at the time of making it, he fraudulently alledge that he was of age. (c) He is not bound, though he enter into a contract by the consent of his father. (d)

Infancy is a personal privilege, of which the infant alone can avail himself, and accordingly, an adult cannot plead the infancy of his co-defendant. (e)

For farther particulars under this head, vide ante, 145, also 38, 9.

An infant is liable to a fine or penalty imposed by statute, the same as any other person, e. g. for not training, or disobedience of orders in the militia; for such fines, &c. are incurred not civilly but criminally. (f)

VI. LUNACY, DRUNKENNESS, &c.—Of lunacy we have spoken sufficiently before. (g) This defence, with that of drunkenness, proceeds upon the ground of an utter incapacity to yield that rational assent, which forms a necessary ingredient in all contracts. Both are determinable from the circumstances of the case, like other questions of fact. If the defence be drunkenness, it should be such a state of intoxication, as creates a complete absence of the proper capacity to contract. (h)

(a) 13 John. 480.

(b) 7 id. 557.

(c) 1 John. cas. 127.

(d) 10 John. 453.

(e) Vide 2 John. 279. 5 id. 160.

(f) 4 Mass. Rep. 376. 12 id. 271.

(g) Ante, 145.

(h) Vide 3 Campb. N. P. Rep. 33, & n. (a)

VII. COVERTURE.—We also hinted this defence, ante, 145 ; but it deserves further notice. That the note, bill, &c. of a *feme covert* is absolutely void, vide ante, 89.

An action will not lie against a married woman, upon a contract made by her during *coverture* with or without seal, nor can she sue upon such contract in her own name, even though she have a separate maintenance secured by deed, paid regularly, she living at the same time apart from her husband.<sup>(i)</sup> The only exception is, 1. Where the husband has been banished the state for a crime, by the sentence of a court of justice ;<sup>(j)</sup> or, 2. Where her husband is an alien enemy.<sup>(k)</sup> But not even then, if he ever lived with her in this country, although he be abroad in foreign service at the time of suit brought.<sup>(l)</sup> A third exception was once said to be, where the husband resided out of the state, without any probability of returning, and his wife represented herself, and contracted as a *feme sole* ;<sup>(m)</sup> but this has been again and again overruled.<sup>(n)</sup>

But the death of a person will be presumed after a certain term of absence ; and where it was proved that the husband went away from the country twelve years before, it was held that, unless the wife proved him alive within seven years, her plea of *coverture* could not be supported.<sup>(o)</sup> And so, where the husband went to sea, and had not been heard of in twelve years, it was held that the wife might be sued as a *feme sole*.<sup>(p)</sup> And, in general, where no account can be given of a person in seven years, his death is presumed, in analogy to the statute, 19 Car. 2. c. 6, with respect to leases dependent on lives, and the statute of bigamy, 1 Jac. 1. c. 11, correspondent to which are our statutes, 1 N. R. L. 103. id. 113. except that our statute of bigamy adopts five instead of seven years.<sup>(q)</sup>

A sale of the husband's goods by the wife is void, and he may have trover for them.<sup>(r)</sup>

The husband is entitled to whatever she earns, or becomes due to her by contract, during *coverture*, and may sue in his own name therefor, (vide 1 Barnwell and Alderson's Rep 213 ; ) and he is, moreover, entitled to all her choses, both in action

<sup>(i)</sup> 17 John. 167. 8 T. R. 545. 2 Bl. Rep. 1079. But vide Reeve's Domestic Relations, 100 to 104, where the latter part of this proposition is treated as a *questio vexata*.

<sup>(j)</sup> 1 T. R. 6.

<sup>(k)</sup> Vide Reeve's Domestic Relations, 100, & cases there cited.

<sup>(l)</sup> 3 Campb. N. P. Rep. 123.

<sup>(m)</sup> 1 Ld. Raym. 147.

<sup>(n)</sup> 1 Salk. 646. 2 Wils. 308. 1 Bos. & Pull. 339. 4 id. 80. 2 Esp Rep. 18.

<sup>(o)</sup> 2 Campb. Rep. 113.

<sup>(p)</sup> 18 John. 141.

<sup>(q)</sup> 18 id. 143, per Spencer, ch. J. 6 East, 80, 84.

<sup>(r)</sup> Com. Dig. tit. Baron & Feme

and possession, which were her's at the time of the marriage ; and her choses in action, though uncollected during her life time, belong absolutely to him, if he survive.(9 John. 112.)— But otherwise, if she out live him. They then survive to her. He is also liable for all debts and demands against her, arising before coverture, if sued for during coverture ; though not after her death,(s) even though he expressly promise to pay (i)

While the wife lives with the husband, all her contracts for necessities shall bind him, for his assent to these shall be presumed, unless the contrary expressly appear ;(u) and so, though she live separate from him, if the articles furnished be suitable to her condition in life.(v) So, if he leave his wife or send her away, or use her so cruelly, that she cannot live with him ; but these are all the proper debts of the husband : the wife cannot be sued for them.(w) He is not, however, liable even for necessities, if she elope without cause, except it be after she has applied to him to return,(12 John. 293 ; ) but, if the elopement was adulterous, he is not bound to receive her again, and an application to return, will, consequently, not revive his liability. If, however, he does receive her, whether the elopement be adulterous or not, he is accountable as before.(x) And where the elopement, though voluntary, was not adulterous, and a friend, without the wife's authority, requested the husband to receive her, which he refused upon grounds other than the want of such authority, it was holden to revive his liability for necessities.(o)

If a tradesman trust the wife, after the husband has forbidden him, he cannot recover, and it is sufficient for the husband to give general notice, (by advertisement for instance) that people do not trust his wife,(p) and this should be done, wherever the husband means to protect himself from liability, in all cases of voluntary separation, and the settling a separate maintenance ; for until these things become matter of reputation in the neighbourhood where the parties reside, the husband will continue liable.(q) Such advertisement, however, will make it matter of reputation and protect the husband,(r) as effectually, as reputation from any other cause ; and this general reputation in the place where the husband lives is sufficient, though it do not ex-

(s) Vide cases cited 1 Com. on Con. 184.

(i) 7 T. R. 344. 8 John. 149. 15 id. 403. Ante, 307.

(u) Vide cases cited 1 Com. on Con. 186

(v) 12 John. 428.

(w) Vide cases cited 1 Com. on Con. 186 to 190.

(x) 3 Esp. Rep. 225.

(o) 12 John. 293.

(p) Ld. Rayn. 444, 5.

(q) id. 8 John. Rep. 72, 3.

(r) id.



tend to the place where the debt was contracted.(s) But in case of elopement, though the tradesman have no notice of this, if he trusts the wife, the husband is not liable.(t)

The husband is not liable if the wife live apart from him on a separate maintenance, by deed or writing, which is regularly paid, and known or published as above mentioned.(u) But such maintenance must be settled in writing, and some payment must be shown.(v)

If a man and a woman live together and pass in the world as husband and wife, the man is liable for her necessities or contracts, the same as if she were in fact his wife.(w)

In a suit for necessities furnished the wife, in a state of separation from the husband, it must, of course, be proved by the plaintiff, that the articles furnished were suitable to the state and degree of the husband.(x)

VIII. ALTERATION IN TERMS OF CONTRACT BY CONSENT.—The parties may, by consent, vary the terms of their contract at any time before breach; and a written, or even sealed agreement may be thus enlarged or modified by parol.(y) But where a time of payment is mentioned in a writing, or where no time is specified, in which case the law construes it payable immediately, no parol agreement made at the execution of the contract, fixing the time of payment different from its terms or legal import on the face of the writing, is admissible; for this would be to vary a written contract by parol (z) Nor will a subsequent parol agreement to vary the first be binding, where the first would, if by parol, be void by the statute of frauds; for instance, where such first agreement concerns land, &c.(a)

IX. CONTRACT ILLEGAL OR IMPOSSIBLE TO PERFORM, OR BECOME SO.—Of contracts illegal in their origin, enough was said, ante, 132 to 146. A contract to do an act *physically impossible*, at the time of contracting, is also void, and no action lies for its violation; as, to build a large house in a day, to go to Rome in a day, &c.(b) And it is the same in law, if the act *become* illegal, as if a statute should pass, preventing the performance of

(s) 12 Mod. 244.

(t) Id. Raym. 444, 5. 1 Stra. 647.  
2 id. 706. 12 Mod. 372.

(u) id. 12 Mod. 244. 8 John. 72.

16 id. 38. 5 Bos. & Pull. 148.

(v) 8 John. 72, 3. 5 Bos. & Pull.  
148.

(w) Vide 1 Com. on Con. 214, &  
cases there cited.

(x) 1 Com. on Con. 192.

(y) 1 John. cas. 22. 3 John. 528.

(z) 8 John. 189.

(a) 15 id. 204, per Thompson, ch.

J.

(b) Vide Powell on Con. 160 to  
165, & cases there cited.

the contract, or rendering it *criminal*; though if part only be prohibited, the rest must be performed.

So when the thing stipulated, becomes physically impossible by the act of God, (or as Sir William Jones will have it, " inevitable accident,") (c) this equally excuses the performance; as if a lessee covenant to leave timber standing, which is blown down by a tempest, or agree to restore a horse which dies of disease, without the borrower's fault; or where A contracts with B, to serve him a year at a certain salary, to be paid at two several times, and B dies before the year has expired, and after the first payment, in the two first cases, the lessee, or borrower, would be discharged, and in the last, A loses the rest of his salary, and is discharged from his service. But in all these cases the agreement must be performed as near its intent as may be. (d) And so of other the like cases.

X. AN INSOLVENT DEBTOR.—When the assignees of an insolvent must sue on his debts, vide ante, 305.

Where three assignees are appointed, and one refuses to act, two may bring the action, (e) and where one partner is insolvent, his assignees must join the other partner, in an action for the debt. (f)

It is to be noted, that no property will pass by the assignment of an insolvent, except such as both legally and equitably belongs to him; but not property which he holds in trust for others, as guardian, executor, trustee, &c. even though it be in money, if such money be kept by the insolvent distinct from his other property. (g)

These remarks, with those made ante, 305, are applicable to every insolvent under whatever act discharged; but there are some peculiarities attending our different insolvent acts, which I shall hereafter notice as I proceed.

A discharge under the act of 1801, (h) is a defence against all debts wherever made. This point was decided in *Penniman v. Meigs*. (9 John. 325.) It is impossible to determine from the report of this case, whether it arose under the insolvent act of 1801, or of 1811, (i) but be this as it may, the terms of the dis-

(c) Jones on bailments, 104, 5.

(d) Vide Powell on Con. 444 to 451, & cases there cited.

(e) 13 John. 314.

(f) 1 Chitty's pl. 15, & cases there cited.

(g) 10 John. 63. id. 289. 2 John. cas. 227.

(h) 1 R. L. by Kent & Radcliff, 428.

(i) Sess. 34. ch. 128.

charge under the one(*j*) are equally broad as authorized by the other.(*k*) Under the act of 1813.(*l*) the discharge does not (by its own provisions) affect creditors resident without the United States, unless two thirds in amount of all the insolvent's creditors, wherever resident, shall join in the petition for his discharge, or unless such foreign creditor petitions, or comes in and accepts a dividend under the act. These acts and decisions have all of them, however, (as we shall soon notice) been qualified by subsequent ones of the United States and of this state, by which our views must now be bounded in judging of their operation.

An insolvent discharge extends to such debts only as are specific, and to which the creditor can make oath, or which are capable of liquidation at the time of the assignment, and unless the debt come within this description, it will not be discharged.(*m*) Thus, the costs arising on a judgment obtained against an insolvent before his discharge, are a debt capable of liquidation, and therefore barred, even though they be not taxed nor the roll signed ;(*n*) but this would be otherwise, if no judgment was then obtained, though some part of the costs had before arisen. For these, therefore, on obtaining judgment, the party may either have execution, or sue the judgment, notwithstanding the discharge.(*o*) Within this principle, also, a bond to perfect the title to lands, forfeited at the time of the discharge, is proveable under the act : It will draw a dividend, and hence no action can be maintained upon it ;(*p*) but an indorser, bail or other surety, paying the money of his principal, subsequent to his discharge, becomes, by this act, a creditor for the first time, and may bring an action for money paid. &c. against the insolvent, for whom the discharge will, in this case, be no protection, even though such indorser had been charged by notice of the insolvent maker's default, anterior to granting the discharge.(*q*) And an indorser, who is discharged before the note indorsed falls due, is still liable as indorser ;(*r*) and such is still the law with regard to all our old insolvent acts ; but by the express provisions of the act to abolish imprisonment for debt, in certain cases,(*s*) insolvent indorsers discharged under that act, are exempted from imprisonment on a judgment obtained upon such indorsement, though the note or bill indorsed be not due at the time of the discharge. Equally within the principle we have been consid-

(*j*) 1 R. L. per Kent & Radcliff,  
431, s. 7.

(*k*) Sess. 34, ch. 123, s. 4.

(*l*) 1 N. R. L. 460.

(*m*) 1 John. cas. 73. 15 John. 467.

(*n*) 3 John. cas. 90.

(*o*) 14 John. 403.

(*p*) 1 John. 375.

(*q*) 1 John. cas. 73. 2 Caine's cas.  
err. 310, S. C. 6 John. 126.

(*r*) 15 John. 467.

(*s*) Sess. 42, ch. 101, s. 11.

ering, is a lessee liable even on an express covenant, promise, &c. to pay rent : though his contract exist at the time of his discharge, yet the rent falling due thereupon afterwards, is recoverable notwithstanding ;(t) for the debt, in such case, arises from the occupation.(u)

A discharge under the insolvent acts of this state extends as well to debts due from the insolvent jointly with others, as his individual debts ; though it will not operate as a release of his co-debtor ;(v) but it is no bar to an action of trover, or for any other mere wrong ;(w) and the insolvent act of 1811, did not, by its own terms, extend a discharge even to a judgment obtained in an action for a tort.(x)

A discharge under the act of 1801.(y) and 1813,(z) may be given in evidence under the general issue ; but if the discharge be obtained after plea pleaded, it cannot then be received as a defence to the action, unless actually pleaded *puis darrein continuance*.(a) and if the defendant neglect to do this, he may be imprisoned, or sued upon the judgment, notwithstanding such discharge ;(b) but this would be otherwise, should his discharge be obtained too late to be pleaded ; as if it be after trial or judgment.(c) This rule requiring a discharge to be pleaded *puis darrein continuance*, in the cases above mentioned, is doubtless the same, with regard to discharges under any of our insolvent acts. A discharge under the act of 1811 cannot be given in evidence with the general issue, unless notice be given thereof pursuant to the act, stating that the defendant had been discharged ; with the name of the Judge or Commissioner, who granted such discharge, with the date thereof, &c.(d) and a discharge is conclusive, and can only be impeached by fraud or other particular causes specified by the act ; and the court will not inquire into the regularity of the proceedings.(e) Where an insolvent omitted to inventory a claim against the United States, but received it after his discharge, this was holden to render it void.(f) This was a discharge obtained in 1793, probably under the three-fourth act of 1788, the provisions of which, as to what shall render a discharge void, correspond, in the main,

(t) 9 John. 127.

(u) Ante, 417, n. (2)

(v) 3 Caine's Rep. 4. 11 John. 193.

(w) 10 John. 289. 14 John. 128.

(x) Sess. 34, ch. 123, s. 25. 9 John. 161.

(y) 1 R. L. per Kent & Radcliff, 484, s. 11.

(z) 1 N. B. L. 466, s. 12.

(a) Ante, 326. 2 Caines, 380. 9 John. 255, 392. 2 id. 294. 1 John. cas. 133.

(b) id.

(c) 4 John. 191.

(d) Vide sess. 34, ch. 123, s. 4. 4 John. 191. 11 John. 162.

(e) 1 Caines, 249. 1 John. 306.

(f) 3 John. cas. 125.



with our later insolvent acts in this respect.(g) It has been holden that a fraudulent conveyance of property before the act of 1811, is not a fraud against that act ;(h) but a discharge under that act on a petition to the first Judge, and completed by a Commissioner, is void (i)

The Supreme Court of the United States, in *Sturges v. Crowninshield*.(j) decided that the insolvent act of 1814 was unconstitutional and void, except for the purpose of discharging the debtor from imprisonment. That was an action on two promissory notes, dated in March, 1811, and the act was passed in the April next thereafter. The court, however, do not appear to ground their decision upon the retro-active operation of the statute ; but go upon the broad principle, that insolvent laws discharging the future acquired property of the insolvent from liability, are, so far, acts impairing the obligation of contracts, and contravening the provisions on this head, contained in the constitution of the United States.(k)

Afterwards, before the same court, in *McMillan v. McNeill*, (l) the action was upon a contract made in South Carolina, while both parties resided there, upon which the defendant became liable in 1813, but afterwards removed into the state of Louisiana, under an insolvent law of which state, passed in 1808, he obtained (*in terms*) a discharge from all his debts. The court pronounced this proceeding void, so far as it affected to discharge the future property of the defendant ; and that therefore it was no bar to the action, laying down the doctrine expressly, that, although the insolvent act passed long before the contract, this made no difference in the application of the principle established in *Sturges v. Crowninshield*, and they repeat the position, that this is a law impairing the obligation of contracts, and therefore void.

Shortly after these decisions, a general attack was made upon our insolvent laws, in the case of *Mather and Strong v. Bush*, which, with several other causes involving the application of the above two United States' cases, were brought before the Supreme Court of this state.(m) And this interesting controversy has resulted, for the present, in the adoption of the following distinction by our state courts, viz. That where citizens of the same state, make a contract which is afterwards discharged by an insolvent law of the same state, existing and in force at the

(g) Vide Greenleaf's ed. Laws, vol. 2. 208, s. 11.

(h) 10 John. 442.

(i) 10 id. 226.

(j) 4 Wheaton, 122.

(k) Art. I, s. 10.

(l) 4 Wheaton, 209.

(m) 16 John. 239.

time of the contract, such discharge is valid, and may be pleaded in bar, &c. But where an insolvent law is made subsequent to the contract, or in relation to future contracts between citizens of other states, it is inoperative, so far as it aims to affect after acquired property.(n)

In an action on a judgment, upon which the defendant has been imprisoned, but discharged on petition, under the act for the relief of debtors, with respect to the imprisonment of their persons,(o) the defendant must plead his discharge specially, or he waives the privilege granted by the act, of future exemption from imprisonment for the same cause.(p) The reason given for this, is, that the discharge is void if the defendant be convicted of perjury in obtaining it.(q) The plaintiff should, therefore, have the chance of replying, and proving this fact; and if the defendant omit giving him this chance, by insisting on his discharge by plea, he waives his privilege, and may be imprisoned again. A provision to the same effect exists, in relation to a discharge on affidavit from imprisonment under the twenty-five dollar act.(r) And should the defendant be sued again after a discharge thereupon, and omit to interpose his plea of such discharge, it would, without doubt, be adjudged a waiver of his privilege, and he might be again imprisoned upon the second judgment; and it may be laid down as a rule, that where an insolvent act grants a discharge from arrest and imprisonment for debts, but provides that such discharge shall be void for certain causes, the insolvent, in order to avail himself thereof, must plead it in discharge of his person, and if he omit to do so, it is a waiver of the privilege he acquired under it.—Such, since the above decision in *Sturges v. Crowninshield*, &c. is the act of 1811, in relation to certain contracts, and it has accordingly been determined that it must be pleaded;(s) and such is our present “act to abolish imprisonment for debt in certain cases,”(t) under which most insolvent discharges are at this day obtained. The same rule would now apply to a discharge under the first section of the “act for the relief of debtors with respect to the imprisonment of their persons,”(u) and indeed, to all insolvent discharges affecting the person. Even where a discharge under the 3-4. or 2-3. act or the act of 1811, would be void as to property, it must still be pleaded as to person, or the defendant loses all benefit under it: even exemption from imprisonment.(18 John. 54.)

(n) id. & vide 17 John. 108.

(o) 1 N. R. L. 348.

(p) 15 John. 152.

(q) 1 N. R. L. 351, s. 6.

(r) id. 395, s. 12.

(s) 13 John. 54.

(t) Sess. 42, ch. 101.

(u) Sess. 42, ch. 106.

**FORM OF A PLEA OF DISCHARGE TO AN ACTION ON A JUSTICE'S JUDGMENT, IN ORDER TO EXEMPT THE DEFENDANT'S BODY FROM IMPRISONMENT, (under 1 N. R. L. 394, §, s. 12.)**

The said D says, that the said P ought not to have or maintain judgment against the person of the said D and thereby render his person liable to imprisonment, because he says, that, at the time of the rendition of the said judgment, and from thence hitherto, the said D had, and now has a family in this state, and during all the time aforesaid, was not, and now is not a freeholder. And the said D farther says, that by virtue of a certain execution, issued upon the aforesaid judgment, he, the said D, was, on the first day of August, A. D. 1820, arrested and committed to prison in the common gaol of the county of Saratoga; and did there remain in prison for more than thirty days, by virtue of the said execution; whereupon, to wit, on the second day of September, A. D. 1820, he, the said D, did make affidavit before A B, one of the justices of the peace of the said county, in the presence of C D, the gaoler of the said county, appointed to keep the prison aforesaid, that, at the time of the rendition of the said judgment, and from thence then hitherto, and then, the said D had a family in this state, and during all the time aforesaid, was not a freeholder, and that the said D had been imprisoned as aforesaid, for the time aforesaid. And the said D did then and there produce and deliver to the said gaoler the aforesaid affidavit, and was thereupon discharged from the said imprisonment, according to the form of the statute in such case made and provided. And this he is ready to verify. Wherefore the said D prays judgment, whether the said P ought to have execution for his debt to be adjudged to him in this behalf, on or against the person of the said D.

*If the imprisonment be of a single man for sixty days, vary the plea accordingly. The above plea can also be easily adapted to a discharge under the first section of the act for the relief of debtors, &c. (1 N. R. L. 348. Vide ante, last note (u).)*

*Plea of a discharge under the "act to abolish imprisonment for debt in certain cases," (Sess. 42, ch. 101.)*

The said D says, &c. (as in the last,) because he says, that, after the making the said several promises in the said declaration mentioned, and before the commencement of this suit, to wit, on, &c. at, &c. the said D being then and there an inhabitant of the county of Saratoga, and an insolvent debtor, within the true intent and meaning of the act, entitled "an act to abolish imprisonment for debt in certain cases," did present a

petition to James Thompson, Esq. first judge of the Court of Common Pleas, of the county of Saratoga, setting forth, that the said D had become an insolvent debtor, and praying that the said D's estate might be assigned for the benefit of all his creditors, and that the person of the said D might forever thereafter be exempted from all arrest or imprisonment, for or by reason of any debt or debts, due at the time of making such assignment, or contracted for before that time, though payable afterwards ; and such proceedings were thereupon had, agreeable to the directions of the said act, that the said James Thompson, being first judge as aforesaid, on, &c. at, &c. did, in pursuance of the said act, make a certain discharge in writing under his hand and seal, in the words and figures following to wit : (Here set forth the discharge verbatim,) as by the said discharge will fully and at large appear. And the said D avers, that the said D, in this suit, and the said *Richard Roe*, in the said discharge mentioned, are one and the same person, and not other, or different. And this the said D is ready, &c. wherefore, &c. (pray judgment as in the last.)

The directions given by Ch. Justice Pennington, to the New-Jersey Justice, &c. in his treatise on small causes, p. 235, 6, 7, in respect to proceedings under the insolvent acts of that state, liberating the defendant's person, so far as they may be useful here, are as follows : " That as the insolvent's persons are exonerated from imprisonment, the process against them should, in general, be by summons : no notice, however, need be taken, either in the summons or declaration of the discharge of the defendant under the law ; but the defendant in case he wishes to avail himself of the discharge, to protect his person from imprisonment, should plead it. If the plaintiff mean to contest the fact of the discharge, he should *deny, by a short replication, that the defendant was discharged in manner and form as he has pleaded* ; but if the fact be admitted, he may take judgment against the defendant *to be levied of his goods and chattels*. The execution in this case, is to go without the usual clause, "*for the want, &c. to take the body, &c.*"

*The following plea of discharge under the 3-4 act of 1801, (1 R. L. by Kent and Radcliff, 428,) was adjudged good on general demurrer, in Supreme Court, October Term, 1816, in Weston, surv. of Weston & Willoby, v. Robinson, M. S.*

And for further plea in this behalf, leave of the court here, for this purpose, being first had and obtained, according to the statute, &c. the said H says, that the said R ought not to have or maintain his aforesaid action thereof, against him ; because he says, that, after the making the said several promises and undertakings mentioned in the said declaration of the said R, and



before the commencement of this suit, to wit, on the 7th day of January, A. D. 1806, to wit, at the city and in the county of Albany, the said H being then and there, (9) an insolvent debtor within the true intent and meaning of the act, entitled "an act for giving relief in cases of insolvency," did, in conjunction with so many of his creditors, (10) who had debts bona fide owing to them, amounting, at least, to three fourths of all the monies owing by him, present a petition to Smith Thompson, Esq. one of the Justices of the Supreme Court of Judicature, of the state of New-York, (11) setting forth, that the said H had become an insolvent debtor, and that the petitioners were desirous he should be discharged in pursuance of the act aforesaid, and praying that the estate of the said H might be assigned and delivered over to E O, for the benefit of his, the said H's creditors; and such proceedings were thereupon had, agreeable to the directions of the said act, that the said Smith Thompson, being one of the justices as aforesaid, on the 7th day of February, in the year of our Lord, 1806, at the city and in the county of Albany aforesaid, did, in pursuance of said act, make a certain discharge in writing, under his hand and seal, in the words and figures following, to wit: "To all to whom these presents shall come, or may concern: Know ye, that whereas H R, of M, in the county of S, an insolvent debtor, having produced to me a certificate, under the hand and seal of E O, the assignee of the said insolvent, executed in the presence of two credible witnesses, that said insolvent had granted, conveyed, assigned, and delivered for the use of his creditors, all his estate real and personal, both in law and equity, in possession, reversion, or remainder, except wearing apparel and bedding, not exceeding 50 dollars in value, and all books, vouchers and securities relating to the same, and, having made satisfactory proof before me, that the said insolvent had, in all things, conformed to the directions of the act, entitled "an act for giving relief in cases of insolvency," passed the 3d day of April, one thousand eight hundred and one: Now, therefore, in virtue of the said act, I, the said justice, do hereby release and discharge the said H R, of and from all debts due by him

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(9) Under the present 2-3 act, insert here the words, "an inhabitant of the said county, (the county of which the insolvent was an inhabitant, when the application for discharge was made :) and " (or these words, according to the fact) "imprisoned in the common gaol of the said county and." (Vide 1 N. R. L. 463, s. 6.)

(10) Under 2-3 act, insert here these words, "residing within the United States," unless 2-3 of all the insolvent's debts shall have been signed off. (id. 460, s. 1. 3.)

(11) These discharges under the 2-3 act, are generally granted by first judges of counties, in which case the language is "first judge of the Court of Common Pleas of the county of " and so according to the fact.

to any person or persons, whomsoever at the time of the said assignment, or contracted for before that time, though payable afterwards, agreeably to the act in such case made and provided. Given under my hand and seal, this 7th day of February, 1806. SMITH THOMPSON, (L. S.) As by the said discharge will fully and at large appear. And the said H avers, that the said H in this suit, and the said H in said discharge mentioned, are one and the same person, and not other or different.— And this he, the said H, is ready to verify ; wherefore he prays judgment, if the said R, his action aforesaid thereof against him, ought to have and maintain.

In setting forth the proceedings under the various acts of insolvency, it is sufficient to state, in the first place, enough to give the judge or commissioner, jurisdiction of the matter, and then to say, generally, *such proceedings were thereupon had, &c.* as in the above plea, without setting forth all the intermediate proceedings, between the petition, &c. and the granting the discharge. (v) And this is a rule as to setting forth the proceedings, of any inferior court. (w) But if the defendant undertakes to set forth such intermediate proceedings, he must show that they conform strictly to the statute, or the plea will be bad. (x) But where the plea stated, that the defendant was in custody on an execution, for less than 2,500 dollars, and was discharged by the Court of Common Pleas, pursuant to the act for the relief of debtors, with respect to the imprisonment of their persons, it will be intended, unless denied by the plaintiff's replication, that the Common Pleas had jurisdiction. (y) But a plea alledging *generally*, that the prisoner was discharged out of custody by due course of law, is bad on special demurrer ; (z) and a plea of discharge, under the insolvent act, stating generally, that the defendant being an insolvent debtor, and having in all things conformed to the directions of the act, had in pursuance thereof, obtained his discharge, as by relation to the discharge will more fully appear, is bad. (a)

XI. HIGHER SECURITY GIVEN.—This is where one, having a debt due by simple contract, accepts a security for the same debt by an instrument under seal ; as if the debt be reduced into a bond, covenant or mortgage. So, if a judgment be taken or obtained upon any contract, it operates as an extinguishment thereof. But a contract is not extinguished, if the security be only of equal or inferior degree ; and a judgment, without satisfaction, must be upon the very contract itself,

(v) 1 John. 91. 2 id. 363.

(w) id.

(x) 7 id. 75.

(y) 2 John. Rep. 433.

(z) id.

(a) 3 John. 242.

claimed to be discharged by it, and not upon some other security given in its stead ; otherwise it is no extinguishment of the original contract, without actual payment or satisfaction. &c. The higher security must be executed by the party to the first, in order to extinguish it, and not by a third person ; though, if one partner give his bond for a partnership debt, it has been holden an extinguishment thereof. An infant's bond, being void, will not extinguish his contract for necessities, and so I presume, upon the same principle, no security which is void, can operate as an extinguishment ; as if it be void for duress, coverture, usury and the like.(b)

Within the above principles, it has been decided, that a bond and mortgage will not extinguish a sealed note ;(c) a bond and warrant of attorney for the amount of a previous judgment, will not extinguish the first, though judgment be entered upon the bond ;(d) and a judgment on a covenant to pay rent, contained in a lease, will not extinguish the right of distress upon the same lease for the same rent.(e)

But if the higher security, a judgment confessed, for instance, be taken merely as a collateral security to the first, it will not extinguish it, without satisfaction ; and where the second security is between different parties, and for other debts beside the original one, and not for the exact amount of that debt, it will be deemed collateral, without any express agreement to that effect.(f)

XII. ERASURES, ALTERATION, &c.—When a deed is altered, in a point material, either by the party or a stranger, without the privity of other parties concerned, be it by interlineation, addition, razing, or drawing a pen through a line, or through any material word, or by tearing off the seal, it becomes void.(g) But if a stranger alter it in a point not material, it does not avoid the deed. If the alteration be material in one covenant, it avoids all the covenants in the deed ;(h) but where the covenantors are bound severally, tearing off one seal, shall not discharge the other covenantors, for it is a distinct deed as to each.(i)

(b) Vide Bac. Abr. tit. Extinguishment, D. and the authorities there cited. Philadelphia ed.

(c) 8 John. 54.

(d) 11 id. 413.

(e) 13 John. 240. 2 Binney, 146.

(f) 14 John. 404.

(g) 11 Co. 28. 5 Co. 32.

(h) 11 Co. 28.

(i) 5 id. 23.

**XIII. SEVERAL PLEAS, PLEA AND NOTICE.**—The defendant in a justice's court, should always plead the general issue, when it will answer his purpose, and not only upon a special plea alone, especially where he is without professional assistance ; for special pleading is not the element of any man, unless he be a well bred lawyer. Where it is not necessary, it only tends to endanger the defendant's cause, generally speaking, and to give both him and the justice, a great deal of trouble and embarrassment.

Pleading a matter with the general issue, however, in a separate plea, which might have been given in evidence, under the general issue, without having been pleaded, though it be pleaded badly, will not prevent its being given in evidence, for this is merely seeking double chance to get the matter of defence before the court, like several counts in a declaration, and though one fail, another may stand, and support the defence ; and in order to give the defendant an equal chance with the plaintiff, in this respect, which he had not at common law, being there confined to a single plea or defence for each cause of action stated by the plaintiff, the legislature, in the act for the amendment of the law, (j) authorizes the defendant, by leave of the court, to plead as many separate pleas in answer to any one cause of action, as he may think proper ; and the defendant, in practice, does this of course, subject to be driven to his election of what pleas he will abide by, provided they be altogether inconsistent, and the plaintiff objects to their standing together, before he replies to them. (k) But in a *qui tam* action, the defendant can plead only one plea to each count, (l) as at common law.

Where, however, there is a right to plead double, hardly any pleas will be holden inconsistent. (m) The general issue and a tender, either of part or the whole, has been holden so, as presenting too great an incongruity on the record to be tolerated ; (n) and that tender and alien enemy cannot be pleaded together, even to different counts : (o) nor, in trespass, pleas of the general issue, alien enemy, and a justification. (p) *Nul tiel record* and payment are also inconsistent, for they require different trials ; the first must be tried by the record ; the

(j) 1 N. R. L. 519.

(k) Vide 1 Dunlap's N. Y. Pract. 470, 71, & cases there cited.

(l) 2 Wils. 21. Com. Dig. pleader, E. 2.

(m) Vide 5 Taunt. 340.

(n) 4 T. R. 194. 5 id. 97. 4 Taunt. 459. 10 East, 326.

(o) 10 East, 326.

(p) 12 East, 206, & vide Black. Rep. 1326.



latter by the justice or jury.(g) And where the defendant pleaded payment before the day, and at the day, the court ordered the first plea struck out, because it might be given in evidence under the last ;(r) but the court will not be nice in discriminating between the different pleas, in order to test their consistency.(s) If the defendant rely upon title, in a defence of an action of trespass on lands, he will be confined to plead it specially, and will not be allowed to interpose the general issue, either in the justice's court, or when it comes to the court of Common Pleas.(t) With these exceptions, the defendant may plead as many pleas as he thinks proper, in answer to the same matter, however contradictory and inconsistent they may appear.(u) If the plaintiff have demurred, or replied to the pleas, the court will not afterwards require the defendant to elect, however inconsistent they may be.(1 John. cas. 246. S. C. Coleman, 91.)

The above distinctions are, however, more formal than substantial, for by the last mentioned statute,(v) all matters of defence may be given in evidence, under the general issue, provided the defendant gives notice thereof with his plea. This is only a more easy manner of pleading the matter of defence, and the notice must include substantially the same facts truly set forth as a special plea of the same matter,(w) though it will be regarded with less strictness than the latter, in matters of form ;(x) but evidence of matter which it does not set forth, cannot be given unless admissible without notice.(y) The proper mode of testing its validity is, to see whether it would be good on general demurrer, if its matter were specially pleaded.(z)

This notice cannot be given, unless the general issue be pleaded,(a) and matter triable by a jury, cannot be given notice of with the plea of *nul tiel record*.(b) The giving notice of special matter will not, like a special plea, be construed to admit and avoid the plaintiff's declaration.(c) And as the plaintiff cannot reply to a notice, he will be allowed on the trial to give in evidence, in answer to the defence contained in the notice, any matter which, had the pleadings been special, would

(g) Coleman, 41. 1 John. cas. 104. S. C. Coleman, 76.

(r) 1 John. cas. 152.

(s) id.

(t) 1 N. R. L. 390, s. 7. 2 Caines, 28.

(u) 1 Dunlap's N. Y. Prast. 471, 2; & cases there cited.

(v) 1 N. R. L. 515, s. 1.

(w) 14 John. 89. 11 id. 494.

(x) 8 John. 455. 14 id. 89.

(y) 11 id. 494.

(z) 13 John. 475.

(a) 3 Caines, 150.

(b) 13 John. 329. 8 id. 83.

(c) 8 id. 169.

have formed the subject of a replication ; and this, on the other hand, the defendant may rebut by evidence of facts, which would have constituted his rejoinder. (d)

Thus, the defendant may take three chances of getting in his matter of defence. 1. It may be evidence under the general issue ; 2. He may plead it : or, 3. He may give notice thereof with the general issue, and, in general, he may both plead and give notice thereof, with the general issue, adapting his pleas and notice to every possible shape in which his proof may be expected. He is thus placed on an equal footing with the plaintiff, by whom he is assailed, perhaps, with his variety of counts. (l)

#### OF THE QUALITIES OF PLEAS IN BAR.

1. A plea in bar must be adapted to the nature of the action, and, accordingly, not guilty in covenant, or *nil debet* in trespass, would be bad on general demurrer ; and so of the like cases. (m)

2. Every plea must answer the whole declaration, or the particular count or counts in the declaration, to which it is intended to answer. (n) The meaning of this is, that it must state sufficient matter to show that the plaintiff cannot sustain his action, if the plea be true, in respect of the declaration, count or counts answered ; (o) but there may be one plea to one count, and another to another count in the same declaration, as we before mentioned ; and we have also just seen that, by statute, there may be several different pleas to the whole declaration or to different counts in the same declaration, or both. (p) Each plea must be sufficient in itself, if true, to bar the entire cause of action it is intended to meet. (q) For example, a declaration in trespass contains two counts, one for trespass on lands, and another for taking goods. The defendant, to the first count, may plead a license, to the second, the statute of limitations, and to both, he may plead not guilty, and any other plea or pleas, as a release, accord and satisfaction, arbitrament, &c.

3. Every special plea of justification admits the truth of the declaration, or count to which it is pleaded ; and must state some circumstances, which either excuse the fact complained of, or show it to be lawful ; for if it do not admit the fact, it amounts to the general issue, and is objectionable, for that reason, on special demurrer ; because, instead of pleading a long

(d) 7 id. 111.

(l) Ante, 390, & vide 5 Taunt.  
228. Cro. Jac. 86.

(m) 1 Chitty's pl. 507, 8.

(n) Vide cases cited 1 Dunlap's  
N. Y. Pract. 461, 2.

(o) id.

(p) Ante, 442, 444.

(q) 2 John. Rep. 437.

state of facts which amount to it, the general issue itself should be directly pleaded.<sup>(r)</sup> But, though it be said that a special plea admits the facts stated in the declaration, this must be understood as being, when the general issue is not pleaded at the same time, and to the same matter ; for, if this be the case, the plaintiff is bound to prove his whole cause of action, and each plea stands in its full force, unimpaired by any other plea. This implied admission, therefore, only respects the particular plea itself, in its relation to the declaration or count answered by it. And the plaintiff cannot avail himself even of an express admission in one plea, as evidence of a fact denied in the other.<sup>(s)</sup>

4. The plea must be single, that is, contain only one matter, or point of defence. For instance, a release, accord and satisfaction, &c. cannot be jumbled into a single plea, but should be made the subject of separate pleas ; though any number of facts, calculated to make only one point of defence, must necessarily be inserted in the same plea. Thus, in justifying the seizure of goods under an execution where the action is by a stranger, the plea must set forth a judgment, an execution, the delivery thereof to the officer, that the goods were the property of the defendant in the execution, &c. ; for these, though distinct facts, must all be stated in order to make out the point of defence, which is the right to seize the goods, and so of almost every special plea.<sup>(t)</sup>

5. The degree of certainty required, is much the same with a plea in bar, as a declaration.<sup>(vide ante, 321 ;)</sup> but no place need be mentioned in a plea, unless it be matter of substance. (1 Chitty's pl. 517.) The particular degree of certainty necessary, will be better understood by the forms which I shall give.

6. A special plea must be direct and positive, and not argumentative, that is, should directly affirm, or deny the matter to be insisted on, or traversed, according to legal understanding, and not state a great variety of facts and circumstances, leaving the point of defence to argument or inference therefrom. Thus, in pleading a license to an action of trespass, instead of stating the conversation, or other facts from which you intend to have a license inferred on the trial, you are to say directly, in your plea, that the plaintiff gave you "leave and license," &c.<sup>(u)</sup>

<sup>(r)</sup> Vide 1 Chitty's pl. 511.

<sup>(t)</sup> Vide cases cited 1 Dunlap's

<sup>(s)</sup> 5 Taunt. 228. Vide also N. Y. Pract. 462, 3.

Cro. Jac. 89.

<sup>(u)</sup> Vide 1 Chitty's pl. 518, 19.

7. Every plea should be so pleaded as to be capable of trial, that is to say, it should contain matter of *fact*, the existence of which may be tried by a jury, or matter of *record*, which is triable by the record itself. Thus, if I be sued for taking a man's goods, and I wish to justify such taking, by pleading a levy under an attachment, it is not enough for me to say that *I lawfully took the goods under an attachment*, for this is a mere inference of law, but I must set forth the attachment, and if I was plaintiff therein, I must show in my plea, that I obtained it regularly, by stating the manner thereof, in order that it may be seen whether my inference be a just one. (v)

A defect in the 3d, 4th and 6th qualities above enumerated, could only be objected to by special demurrer. (w) A lack of the other qualities above mentioned, would, in general, be matter of substance, and, therefore, bad on general demurrer.



## SECTION XI.

### FORMS OF SPECIAL PLEAS IN BAR.

(The commencement is as follows:—title to be varied as directed ante, 332.)

<p>Richard Roe, ads. James Jackson.</p>	}	<p>(1st, plead the general issue adapted to the action as directed ante, 425, 6.)</p>
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And for further plea, the said D says, that the said P ought not to have and maintain his action aforesaid thereof, against the said D, because he says, (*matter of the plea.*)

#### *Plea of a former recovery in bar.*

That on the 1st day of September, A. D. 1819, at a court holden before E F, Esq. one of the justices of the peace of the county of Saratoga, at the town of Saratoga Springs, in the said county, the said P impleaded the said D, for the same identical cause of action, in the said P's said declaration mentioned; and

(v) *id.* 519, 20.

(w) Vide Dunlap's N. Y. Pract.  
460. I Chitty's pl. 513, 519.



such proceedings were thereupon had, in the same court in the plea aforesaid, that afterwards, to wit, on the 10th day of September, A. D. 1819, at the said town of Saratoga Springs, the said P, by the judgment of the same court, recovered against the said D, ten dollars damages, as well for the same identical cause of action in the said declaration mentioned, as for his costs of that suit.

If in debt, say ten dollars debt, (*or as the sum is*) and also two dollars, (*or as the sum is,*) his costs of that suit, being for the same, &c.

*Plea of a former suit, and judgment in favour of the defendant, in which the plaintiff set off his demand.*

That on the 1st day of September, A. D. 1819, at a court before E F, Esq. one of the justices of the peace of the county of Saratoga, at, &c. the said D impleaded the said P, in a certain plea of trespass, (*or as the plea is*) and such proceedings were thereupon had, in that court, in the plea aforesaid that afterwards, to wit, on the 10th day of September, A. D. 1819. at, &c. the said D, by the judgment of the said court, recovered against the said P, ten dollars damages and costs of suit. and the said D avers, that, in the said action before the said E F, he, the said P, did set off against the demand of the said D, in the same action, the same identical cause of action set forth in the said P's declaration; which cause of action so set off as aforesaid, with the other matters in question in the said suit, were then and there heard, tried and determined by the said court before the said E F.

*Plea of a former action, in which the plaintiff ought, but neglected to set off his demand.*

That the said D, after the cause of action in the said P's declaration in this suit mentioned, if any such there were, had accrued, and before the commencement of this suit, to wit, on, &c. at, &c. at a court, holden before E F, Esq. one, &c. impleaded the said P in a plea of trespass on the case upon contract, and such proceedings were thereupon had, in the said court, in the plea aforesaid, that, afterwards, on, &c. at, &c. the said D, by the judgment of the said court, recovered against the said P, ten dollars damages and costs. And the said D avers, that the said P did neglect to plead, or set off against the demand of the said D, in the action aforesaid, before the said E F, the demand and cause of action in his declaration in this suit mentioned. and the said D also avers, that the said suit, before the said E F, was commenced, after the cause of action mentioned in the declaration in this suit had accrued, if any such there were.

*Former trial, and judgment for the defendant, upon the same matter.*

That, on, &c. at, &c. at a court, holden before E F, Esq. one, &c. the said P impleaded the said D, for the same identical cause and causes of action, in the said P's declaration mentioned; and such proceedings were thereupon had, in that court in the plea aforesaid, that, afterwards, to wit, on, &c. at, &c. as well the said P, as the said D, appeared in the said court, before the said E F, justice as aforesaid, and after the proofs and allegations of both the said parties were then and there heard, touching and concerning the same identical cause and causes of action in the said P's declaration here set forth, and the said suit before the said E F, had then and there been tried upon the said proofs and allegations, it was thereupon determined and adjudged, at and by the same court, holden before the said justice, that the said P should go thereof without day, and that the said D recover against the said P thirty-one cents, for his costs, by him expended in and about the defence of the said suit.

As these former trials must be pleaded in a justice's court, and are not admissible in evidence under the general issue, even in an action of assumpsit, or on the case, (10 John. 111. id. 146. 12 John. 455.) I have endeavoured to generalize the language of the above plea, so as to make it a proper form of introducing a former trial on the merits, in all possible cases. whether the trial were by jury, or before the justice, without going the detailed and technical round of stating the particular cause of action, trial, verdict, and judgment, adapted thereto; the instruction upon which head would require a little volume of itself. I think I have succeeded; and that this brief and general plea will be found sufficient upon the liberal principles which govern pleas in bar in a justice's court.

If there be several counts in the plaintiff's declaration, some of which are for the former cause of action, and some for another cause, this plea may be narrowed to meet the count accordingly. And it can do no harm to meet each count separately with this plea. There are, perhaps, no instances in a justice's court, in which the plaintiff's or defendant's ingenuity is more frequently taxed, than in the effort to maintain a re-trial of a cause on the one hand, or to defeat it on the other. Sometimes when a plaintiff fails in one form of action, he will resort to another for the same cause: he has, perhaps, split a cause of action into several parts, and tried only one, and is now going for another part; his former declaration was perhaps obscure and equivocal; and it is a question many times doubtful

in evidence, what was submitted and what withdrawn from the consideration of the court or jury ; and so of matters which formed the subject of a set off, in a former suit. But the decisions of the Supreme Court, on these topics, seem to meet almost every difficulty which can possibly arise.

With regard to the plea of a former trial or recovery, we have seen, (x) that the plaintiff may sometimes elect to bring one of several kinds of actions for an injury ; and from the loose manner of pleading in a justice's court, it would, many times, be almost impossible, from the mere record, to preserve the identity of actions, even where they were, in both instances, intended to be for the same cause, both in form and substance. In order to obviate these difficulties, it has been determined that if the plaintiff bring one kind of action, and judgment be given against him, this may be pleaded in bar to another description of action for the same cause ; and it has been established as a rule on the subject of this plea, that the *same cause of action* is, where the evidence will support both actions in a different form, thereby making the evidence given in the first action, the test of its identity with the second. (y)

When a demand has once been submitted to a jury, and passed upon by them, it is a complete bar to another action for the same cause, (z) whether a judgment be entered on the verdict or not, (a) if tried by a jury ; and it is equally a bar, if the cause be finally submitted to the justice, whether he ever give a judgment upon it or not. (b) And the particular form of the verdict or judgment will not vary its effect ; for where the verdict was *no cause of action*, (c) in one case, and, in another, the justice, after having taken time to advise, suffered the plaintiff within the four days to withdraw his action, and gave judgment of nonsuit against him, (d) the proceeding was holden a bar in both instances, though the plaintiff contended that the verdict in the first was equivalent to a nonsuit, and that he had a right to withdraw and be nonsuited in the second. A verdict against the plaintiff for costs merely, without any damages, will have the same effect ; (e) and if a demand, consisting of a single item, be barely stated to the jury, among other things, who neglect to pass upon, or notice it from any cause, (f) or if a demand be submitted to, and disallowed by them, (g) this will, in each case,

(x) Ante, 313, 14, 15.

(y) 7 John. 20. 3 Wils. 304.

(z) 6 John. 168. 11 id. 530. 16 id.

(c) 2 id. 181.

(d) 11 id. 457.

(e) 2 id. 191.

(f) id. 210. 16 id. 136.

(g) 10 id. 365. 16 id. 136.

136.

(a) 2 id. 181. id. 191.

(b) 11 id. 457.

operate as a perpetual bar to an action for the same ; and should a subsequent jury allow such *submitted* or *disallowed* item or demand, among others properly allowable, the verdict and judgment will, thereby, be tainted for the whole, and reversed entirely. *(h)* And where a demand is submitted and only a part thereof allowed by a justice or jury, it is equally a bar to a future claim for the whole, and every part of the claim submitted. *(i)*

It is upon the principle last stated, that a plaintiff is not allowed to *split* his demand, whether it sound in tort or contract ; and where a constable on an attachment against A, took three bed quilts, and one bed at the same time, the property of B, who brought a suit against him for taking the quilts only, and a trial and judgment was had thereon ; B was holden barred of his further action, not only for the quilts, but the bed also, for here was one indivisible act, constituting an entire cause of action. *(j)* And so where the plaintiff brought separate suits upon the same note, the first suit, though but for a small part of the note, was holden a perpetual bar to a recovery of the residue, and this would not be tolerated even in a proceeding by attachment, against an absent defendant, who is not present to plead the first trial in bar ; but all the subsequent judgments will be reversed notwithstanding. *(k)* And the same doctrine was held, where three barrels of pot-ashes were sold at the same time, and the vendor brought his action and recovered for one of them : This barred his claim for the whole ; *(l)* for, say the court, different actions cannot be sustained for goods, unless they be sold at different times, or in different *parcels*.

But there are certain judgments, as we shall see more at large hereafter, which will not operate as a bar. Thus, a nonsuit, *(m)* or a judgment against the plaintiff on a plea in abatement, demurrer for form, &c. *(n)* will not prevent a second action for the same cause. But of this, when we speak of judgments.

And the plaintiff may waive, on the trial, and withdraw from the consideration of the court or jury, any distinct cause of action, although it come within the general scope of his declaration ; and yet have his second suit therefor, declaring therein in the same form as in the first suit ; and this, although the plaintiff recover under his declaration in the first suit for cau-

*(h)* *id.*

*(i)* 16 *id.* 136. 2 Str. 12, 59. S. P.

*(j)* 15 John. 432. 16 *id.* 136.

S. P.

*(k)* 16 *id.* 121. *id.* 136. S. P.

*(l)* 15 John. 229.

*(m)* 10 *id.* 363.

*(n)* Post, judgments.



ses of action not waived.(o) In such cases, if the declaration in the first suit be broad enough to embrace the subject of the second action, it is, *prima facie*, evidence in bar of the second, and drives the defendant to show negatively, that, although he might, yet he did not, *in fact*, submit his cause of action in the second suit to the consideration of the court or jury in the first.(p)

And again—where there is such a total want of jurisdiction in the court trying the first cause, as would render the magistrate, &c. a trespasser for carrying his judgment into execution, as in the cases mentioned ante, 13, and 217, 18, the first proceeding is no bar to a second suit for the same cause.(q) Thus, where a man brought *trespass* for negligently firing a pistol, and wounding his leg, before a justice, (which was in substance an action of *assault and battery*) and the justice assumed to give judgment against the plaintiff on the merits; he afterwards brought an action of *trespass on the case*, (and he had a right to elect either form of action for such an injury) and recovered, notwithstanding the former trial was given in evidence to defeat him; and this was holden well on certiorari, upon the principle above stated.(r)

And where an indorsee of a note was defeated in his action, upon an objection taken by the defendant, (the maker) that the endorsement was defective, this was holden no bar to a subsequent action upon the same note by the payee;(s) and so where the bearer sues the maker of a note, payable to A, or bearer, and the maker gives in evidence a former suit by the payee upon the same note, and a recovery had against the payee, this is no bar of the second suit, unless it be followed by evidence that the payee was, *in fact*, the owner or bearer of the note, at the time of the first suit.(t)

In the plea that the plaintiff had once set off his demand in a former suit, it is not necessary to distinguish by the plea, nor is it important in evidence, whether the first action was upon *contract* or *tort*; nor is it material what was the nature of the matter introduced as a set off, whether this were matter of *contract* or *wrong*. It is enough, that it has once been set off, and tried, submitted, or stated for trial, and passed into the hands of a court or jury, in the form of a set off, for the purpose of being determined;(u) or, that any part of the entire demand claimed,

(o) 13 John. 227. 16 id. 336, S. P.

(p) 16 id. 136. 6 T. R. 607.

(q) 14 John. 432.

(r) 14 John. 432.

(s) 8 id. 442.

(t) 4 id. 222.

(u) Vide ante, 449, 50.

has thus been dealt with before. (Ante, 450.) And, accordingly, a fraud in the exchange of horses, (v) a trespass, (w) or trover for a spinning wheel, (y) though not the proper subject of a set off, if objected to, yet where such, or other matters of *tort* are actually set off, it has been holden that they can never be questioned again. (z)

In the plea of a former action by the defendant, in which the plaintiff ought, but neglected to set off his demand, which is also a good plea, (a) it is essential that you state in your plea, that the first action was predicated upon contract, (13 John. 210,) and that the same was commenced subsequent to the time when the plaintiff's cause of action in the second suit accrued; for, if the first action was for a *tort*, (b) the plaintiff was not bound to set off his demand, nor could he do so, unless it had existed and been due at the commencement of the suit (c) Thus, where the plaintiff agreed to discontinue his suit, but yet prosecuted it to judgment, in an action upon such agreement, it is no objection, that the demand for a breach of the agreement was not set off in the first suit; for it did not exist till judgment obtained in the first suit; (8 John. 470) and in an action on the case against a bailee, for not returning, or for misusing certain beds, &c. it was holden that no set off could be allowed, if objected to; (d) and, consequently, the first suit was no bar of the second, though this would doubtless be otherwise, if the action against the bailee had been an action of *assumpsit*, instead of an action on the case, as it might have been. (e) So, in *trover*, (f) or *trespass*. (g) in which cases he may also, some times, change the rights of the defendant, in this respect, by waiving the *tort* and bringing *assumpsit* for the goods wrongfully taken or converted. (h)

There are, moreover, certain demands which are not the subject of set off in the former suit, and are consequently not barred by it. It must not only exist, (i) and be due (j) at the commencement of the first suit; but a demand for a *wrong* committed cannot be set off; and this set off is only matter of right, where the claim is founded upon contract. (k) Thus, a demand on a deceit or fraud cannot be set off, if objected to, and if omit-

(v) 3 Caines, 152.

(w) 3 John. 433.

(y) 13 id. 184.

(z) 3 Caines, 152, 3 John. 433.  
13 id. 184.

(a) 1 N. R. L. 389, s. 6, & Laws,  
sess. 41, ch. 94, s. 4. 1 John. 293.  
3 John. 129.

(b) 3 Caines, 85.

(c) 7 John. 22.

(d) 3 Caines, 85.

(e) Ante, 314.

(f) 11 John. 144.

(g) 7 id. 23.

(h) 7 id. 20.

(i) 8 id. 470. 1 id. 283. 7 id. 22.

(j) 7 id. 22.

(k) 1 N. R. L. 389, s. 6, & Laws,  
sess. 41, ch. 94, s. 4.

ted, it is not for that reason barred ;(*l*) but every demand arising on contract may be set off ;(*m*) and though the justice should reject it improperly, when offered as a set off, yet the demand is barred until such former judgment be reversed.(*n*)

But where the defendant offers a set off, which is objected to by the plaintiff, and rejected upon such objection, whether it be a proper subject of set off or not, the plaintiff cannot in a future action for the demand thus rejected, avail himself of the former trial as a bar.(*o*)

In a suit by the payee of a negotiable note against the maker, it is a good defence that, while one A was holder of the note, the defendant brought an action against A, in which A ought to have set off the note ; but if it appear that the note was over due when sold to A, and that previous to the transfer, and before the note fell due, the plaintiff had agreed to take pay for the note in ashes, and that the note was offered as a set off in the former suit against A, but rejected on account of such agreement, this is no bar to a recovery of the note by the payee ; for the note, being over due, passed subject to this agreement,(*p*) and was, therefore, properly rejected.(*q*)

If the defendant hold a contract against the plaintiff, which is broken on the plaintiff's part, at the time of the commencement of the suit, the defendant is bound to set off his claim thereupon, and if he neglect to do so, he cannot afterwards recover, although all his actual damages for the breach, arise after the determination of the first suit.(*r*)

The defendant must set off his demand the very first opportunity, or it is forever extinguished. Thus, in two suits brought against the defendant, in favour of the same plaintiff, the summons in each being returnable at the same time, the defendant must set off his demand in the suit which is first called on, upon the plaintiff's declaring therein, or his right is gone.(*s*)

An illegal set off should be objected to at the time of pleading it, or giving notice thereof, or, at least, before it has been passed upon by the jury.(*t*)

(*l*) 8 John, 390.

(*m*) 1 N. R. L. 389, s. 6, & Laws, sess. 41, ch. 94, s. 4.

(*n*) 5 John. 129.

(*o*) 9 id. 352.

(*p*) id. & vide ante, 97.

(*q*) 9 John. 352.

(*r*) 3 id. 137.

(*s*) id. 428.

(*t*) 3 Caines, 152. 3 John. 433.

Where the defendant pleads to the jurisdiction of the court, that the accounts of both parties exceed \$200, and fails in proving his plea, he cannot then set off his account on the trial. (u)

The plea of a former trial in bar, must be interposed at the time of joining issue; and the defendant cannot plead the general issue, and set up the former recovery or suit at the trial. Neither a former recovery or trial, nor a suit in which the plaintiff ought but neglected to set off his demand, is evidence under the general issue, (v) but if it is suffered to be set up under the general issue, it will not be a cause for reversing the judgment, if a good defence was made out upon another ground. (w)

Where the defendant is authorized to commence an action by warrant, notwithstanding a former suit brought against him by the plaintiff, he has, of course, the right of a trial, although the plaintiff's suit may have been previously tried. This right arises under the statute. (Sess. 41, ch. 269, s. 1.)

In pleading a former suit by the defendant against the plaintiff, in which he ought, but neglected to set off his demand, it is essential expressly to aver, that such former suit was brought before the commencement of the second one; for otherwise, it is clearly no bar. And it is not enough to state, that the former suit was commenced on a certain day, which day happens to be before the commencement of the second suit; for the day is immaterial, and the proof on the trial need not conform to it. (x)

Under the 6th section of the 25 dollar act, (y) it was determined by the Supreme Court, that the defendant was bound to plead and set off a demand against the plaintiff arising upon contract, whatever might be its amount, which gave a right to the justice, in view to the purpose contemplated by the first proviso of that section, to inquire into and determine a defendant's claim to thousands of dollars; and upon this ground, a plea of a former suit in a justice's court, by the defendant against the plaintiff, was interposed as a bar to a very large claim in *Swartwout v. Granger*, to which plea there was a general demurrer. Upon moving this cause for argument in behalf of the plaintiff, in January Term, 1817, Mr. J. Van Ness

(u) 12 John. 205.

(v) 10 id. 111. id. 246. 12 id. 455.

(w) 12 id. 456.

(x) *Swartwout v. Granger*. Sup.

Court, May Term, 1817. M. S.

(y) 1 N. R. L. 389, 90.



remarked, that the principal question arising upon the plea, had been ruled against me at a previous term, but judgment was finally rendered for the plaintiff upon another ground. The legislature being then in session, an act was immediately introduced and passed into a law, by which it is provided, (z) "that no defendant shall be precluded from having any action against the plaintiff to recover his debt or demand, or any part thereof, provided the same shall exceed 25 dollars, over and above all just set off, the plaintiff may have against the defendant, exclusive of the judgment, which the plaintiff may have obtained against the defendant; notwithstanding the defendant may have neglected to set off the same against the plaintiff, before the justice, &c."

A similar provision was afterwards incorporated into the act for extending the jurisdiction of justices. (a)

By section four, of the last cited act, debts secured by bond and mortgage, or judgment cannot be set off; and it has been decided, that in a suit under the 25 dollar act, though the defendant may, yet he is not compellable, to set off a judgment, and, that though this be omitted, he may, notwithstanding, either have execution or set it off in a future action, and (of course) bring his action of debt thereon, without being barred by the previous suit. (b)

But I shall close the doctrine of set off, when I come to speak of the plea and notice, by which the defendant's set off is introduced.

*Of the plea in bar, that the subject of the second suit was properly matter of defence, in the former action.*

This bar is, both in principle and form, very nearly allied to the place of a former trial and judgment on the merits, or a former suit and a neglect to set off the plaintiff's claim. Its formal parts correspond with the latter, in the mode of stating the former action, except that the nature of the former suit should be distinctly specified, in order to show that the plaintiff was bound to set up his present cause of action, as matter of defence therein.

Thus, suppose a man has sold me a horse for \$50, and cheated me in the bargain, but had sued and recovered for the price.

(z) Laws, sess. 40, ch. 21.

(a) Sess. 41, ch. 94, s. 3.

(b) Anonymous. January Term, 1821.

If I should afterwards sue him for the fraud, his plea might be in this

*Form :*

That, on, &c. at, &c. at a court, &c. the said D impleaded the said P, in a certain plea of trespass on the case, upon the said P's promise to pay the said D for the same identical horse, in the said P's declaration mentioned ; and such proceedings were thereupon had, in that court, in the plea aforesaid, that afterwards, to wit, on, &c. at, &c. the said D, by the consideration and judgment of the same court, recovered against the said P, &c. (as in the plea of a former recovery, ante, 446, 7.)

To be varied according to the circumstances of each case.

This plea arises out of the principle recognized by the Supreme Court, in the case of *Le Guen v. Gouverneur and Kemble*, (c) " that the judgment, or decree of a court possessing competent jurisdiction, is not only final as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have decided." It is, therefore, sufficient to show in the plea, that the former cause has been decided, without averring, either that the matter of defence therein forming the subject of the second action, was or was not made the subject of inquiry ; for any matter of defence, which the defendant had a right to show in the former suit, whether it would have gone to the whole cause of action, or only to have diminished the amount of the recovery, must have been there introduced, and cannot be made the subject of a separate suit, whether it were litigated or not.

Thus, where A sold B a patent right, and took B's note and sued him upon it, and B, on the trial, insisted and gave evidence to show that A cheated him in the sale, which was considered by the justice, but he gave judgment for the amount of the note ; this was holden a bar to B's subsequent action for the deceit. (d)

And where A lost a bridle, and accused B of having taken it, who was innocent ; but being threatened by A with a suit, B, together with C, as his surety, gave their note for twelve dollars to A, who told B, that if he could show his innocence, or the bridle should be found, the note should be given up.—

(c) 1 John. cas. 492.

(d) 8 John. 453.

A afterwards sued upon the note, recovered a judgment, and received his money. and afterward B and C sued A to recover it back, upon the ground that A had found his bridle ; but the first suit was holden a bar to the second ; for the subject of the second suit was matter of defence against the action upon the note ; and not being shown to defeat the note, could not be made the foundation of a new suit, upon the above principle in *Le Guen v. Gouverneur* and *Kemble*.(e)

And so where I give a note, but have matter of defence against it, being able to show it void, or that it is paid. &c. &c. and that note is sold after it becomes due, or under other circumstances, which will let in my defence against the holder of it : (f) I am not warranted in lying by and suffering the holder to recover against me ; and then bringing my action against the payee, to recover the damages for the transfer, but I must set up my matter of defence whatever it is, in the first suit ; and my neglect to do so, will create a final bar against me.(g)

So, where I bring an action for work done, the defendant must show in this first action, that the work was not done in a proper manner, if this be the case, and thereby diminish the amount of my recovery, and if he neglect to do this, he cannot sustain his future action for the injury sustained by the neglect.(h)

The above cases are sufficient to show with what steady inflexibility our tribunals have adhered to the principle advanced in *Le Guen v. Gouverneur*, &c. and this rule is perhaps universal, and without exception in a justice's court ; and the subject of all the numerous pleas in abatement, or in bar, which we have mentioned, or could mention, must have been litigated on the defensive, if a suit have been brought and determined wherein they might have come in play as defences ; and they can never afterwards, in such case, be vindicated by a distinct action.

#### *Of the plea or notice of set off.*

This grows out of the 6th section of the 25 dollar act,(i) by which it is provided " that if the defendant hath any account

(e) 9 id. 232.

(f) id. Ante, 97, 8.

(g) 13 John. 187, & vide 12 John. 374.

(h) 14 John. 377.

(i) 1 N. R. L. 389.

or demand (*on contract*;) (1) against the plaintiff he must plead and set off the same ;” or otherwise, he is declared to be forever barred of recovering the same, or any part thereof. We have already noticed many points which relate to this head, while treating of the plea or defence arising from the above provision, (j) and shall not repeat the matter thus already brought into view.

If the defendant mean to avail himself of a set off, he must plead or give notice thereof, at the time of joining issue in the cause, or he is too late and cannot afterwards correct the mistake. (k) But it is no reason for rejecting the defendant's set off, that it exceeds \$200, under the 25 dollar act, and only part thereof is proved ; but the justice should allow as a set off, such portion thereof as is proved, and if the balance against the plaintiff does not exceed 25 dollars, should give judgment for the amount in favour of the defendant, with costs : (l) or, if it exceed that amount, enter judgment against the plaintiff for the costs, as directed by the statute, (m) briefly noting the reason upon his docket.

Where the suit is in favour of an executor or administrator, the defendant is equally authorized and required to set off a claim against the testator or intestate, and the judgment, if it be in favour of the defendant, is absolute against the plaintiff, and collectable out of his proper goods and chattels, though the rule is otherwise, in this last respect, where the action is brought in a court of record. (n)

Where A gives a note not negotiable, which is assigned, and he afterwards promises to pay the note to the assignee, A cannot, (though the suit be brought in the name of the payee,) set off a demand, which arose before giving the note against the payee, for it is to be presumed, from his giving the note, (and his promise renders the presumption irresistible,) that such set off had been paid or satisfied, especially in the absence of all the explanation. (o)

A debt may be set off, which accrued to the defendant, subsequent to the time when the plaintiff's cause of action arose ;

(1) In an action on an award, or on a bond for not performing an award, a set off is allowable. (5 John. 105.)

(j) Ante, 452, 3, 4, 5.

(k) 10 John. 108.

(l) Id. 110.

(m) 1 N. R. L. 389, 90, s. 6.

(n) 10 John. 366. Ante, 297, & vide 1 John. cas. 228.

(o) 16 John. 226.



(*p*) but not if it accrued after the action was commenced ;(*q*) and accordingly, where a defendant, after a writ issued against him, bought a note against the plaintiff with the intent to set off the same against the plaintiff's debt, this was holden inadmissible ; for where a right of action is vested, and an action commenced, nothing can deprive the plaintiff of his right to recover, except some act done by himself in relation to that right.(*r*)

If the plaintiff sue merely as the agent or trustee of a third person, and it was known to the defendant at the time when he entered into the contract, which is the subject of the suit, that the plaintiff acted in that capacity, he cannot set off a demand due to him from the plaintiff.(*s*) And it is not necessary that the defendant should have had express notice of the trust : an implied notice is sufficient ;(*t*) and, accordingly, where the defendant buys a note after it is due, this circumstance is such constructive notice to him of the insolvency of the maker, that he cannot set it off in an action brought in the name of the maker, who had become insolvent, by the assignees of his property in trust for his creditors ;(*u*) for the note being over due was holden sufficient to put the defendant on inquiry relative to the maker's circumstances, and, therefore, equivalent to actual notice.(*v*) A debt, barred by the statute of limitations, cannot be set off ; and the plaintiff may make the objection at the trial, where the set off is introduced by way of notice ;(*w*) but the defendant may answer the objection, by showing an acknowledgment of the debt, or a promise to pay it within six years, the same as in an original action, even though nothing be said of such acknowledgment or new promise in his notice.(*x*)

A separate debt to one of the defendants, cannot be set off against a joint debt due from all the defendants ; nor can a debt due to the defendant and another, or others jointly, be set off against a debt due from the defendant alone ;(*y*) unless there was an agreement between the parties, in relation to their dealings, that such debts might be set off against each other.(*z*)—

(*p*) 2 Maule & Selw. 510. 1 East, 375. 16 id. 138.

(*q*) 3 T. R. 186. 3 John. cas. 148. 8 John. 470, 1.

(*r*) 3 John. cas. 145. 1 Caines, 71, 2.

(*s*) 2 Caines, 299. 3 Cranch, 193.

(*t*) 12 John. 343.

(*u*) 1 John. cas. 51. S. C. 2 Caines's cas. in Err. 303. Vide also 2 John. 274.

(*v*) id. 12 John. 343. Ante, 36.

(*w*) Bull. N. P. 180.

(*x*) 17 John. 330.

(*y*) 11 John. 70. 3 John. Ch. Rep. 569, 573. 5 Cranch, 34. 1 Wash. 79. 10 John. 250. 5 Munford, 383.

(*z*) 2 Taunt. 170.

But where the plaintiff owes a debt to several persons jointly, one of whom owes him, the latter may acquire the right of set off against the plaintiff, by taking an assignment to himself alone, of the debt due from the plaintiff, before the plaintiff's suit is commenced. (a) And where I agree in writing, to work for A, and B guarantees by indorsement, that I shall do it in a particular manner, and I sue A, he may set off damages for a breach of the contract to do the work, against my claim; for B is a mere guaranty, and is not jointly liable with me. (b) An objection that a joint debt cannot be set off against a separate one, must be made at the trial, or it would clearly not avail the party on certiorari. (c)

A debt due to the defendant, as a surviving joint creditor, may be set off against a demand on him in his own right. (d) And, on the other hand, a debt due from the plaintiff, as a surviving debtor, (e) to the defendant, may be set off against a debt due from the defendant to the plaintiff in his own right. (f) When the maker may set off a debt due from the payee, &c. against a subsequent holder or indorsee of a promissory note, vide ante, 97, 8, to which it may be added, that where the holder buys the note, even before it is due, with full notice of the maker's demand, and an intention to defraud him of his set off, the rights of the latter will not be affected by such disingenuous conduct; but he shall be allowed his set off, notwithstanding. (g) It is true, that, in general, debts or demands between persons who are not parties to the suit, cannot be set off; (h) but there are several exceptions to this rule. (i) Thus, the defendant may set off a bond executed by the plaintiff, and assigned by the obligee to the defendant; or any other debt assigned to the defendant, previously to the commencement of the action, although he could not have maintained an action upon it in his own name; (j) and so where the plaintiff is the mere agent or trustee of a third person, without any beneficial interest in the contract; (k) as if an auctioneer sue me in his own name, for goods sold and delivered to me without receiving payment; I may set off a debt due to me from his principal. (l) And where the plaintiff is merely nominal, having assigned the claim sued for to a third person; (m) in these

(a) 17 John. 330.

(b) 10 id. 250.

(c) 11 id. 70.

(d) 5 T. R. 493, S. C. 1 Esp. Rep. 47.

(e) Vide ante, 305, 6.

(f) 6 T. R. 592.

(g) Vide 1 John. 319. 1 John, cas. 170.

(h) 12 John. 276. 1 John. cas. 169. 3 John. ch. Rep. 569.

(i) 13 John. 9.

(j) 8 John. 152. 17 John. 330. 2 Bay, 481. Ante, 37. S. P.

(k) 7 Taunt. 243. 2 Cranch, 342.

(l) 7 Taunt. 243.

(m) 1 T. R. 621, 2. 1 Maule & Selw. 545. 2 Cranch, 342.

and the like cases, the defendant may set off a claim due to him from the principal, *cestuy que trust*,<sup>(2)</sup> or assignee. And so, where a factor, dealing for a principal, but concealing the principal, delivers goods in his own name, the person contracting with him, has a right to consider him to all intents and purposes as the principal; and though the real principal may appear, and bring an action upon that contract against the purchaser of the goods, yet the purchaser may set off any claim he may have against the factor, in answer to the demand of the principal.<sup>(n)</sup> But if the purchaser knew that he was dealing with an agent, he cannot avail himself of a set off against the agent in an action by the principal.<sup>(o)</sup> And so, where one partner delivers partnership property to a third person, who, knowing it to be partnership property, receives it in payment of his individual debt due from the partner delivering it to him, in an action by and in the name of all the partners, against such creditor of the individual partner, for the price of the goods, the debt of the one partner is not a defence or set off against all the partners.<sup>(p)</sup>

In an action against a man for his own debt, he is not allowed to set off a debt due to him in right of his wife: and a debt owing by the wife, while *sole*, cannot be set off in an action brought by the husband alone, unless he has promised to pay the debt after marriage and thereby made it his own.<sup>(q)</sup> But will such promise make it the debt of the husband alone? In *Mitchinson v. Hewson*.<sup>(r)</sup> it was decided that it would not; for it is not a good consideration for his promise. And this case was holden for law in 8 John. 149. 15 id. 403, 4, and vide ante, 307.—The reason why such debts cannot be set off, is, that they are not in the same right. For the same reason, if a defendant is sued for his own debt, he cannot set off what is due to him as executor or administrator, and so, *e converso*. And where an executor sues, though it be *as executor*, for a cause of action arising after the testator's death, the defendant cannot set off a debt due to him from the testator.<sup>(s)</sup>

A debt due upon a judgment may be set off.<sup>(t)</sup> though, as we have seen,<sup>(u)</sup> the omission to do this will not impair its force. But where the defendant obtained such judgment against the plaintiff, on an attachment, it was holden not a proper subject of set off, while the goods attached remained unsold, for the pre-

(2) The person beneficially interested.

(n) 7 T. R. 356. n. a. id. 355. Vide ante, 44, 5.

(o) 2 Caine's cas. Err. 341. 3 Cranch, 193. Vide ante, 44, 5.

(p) 16 John. 34. Vide ante, 49.

(q) Bull. N. P. 179. 1 Esp. Rep. 594.

(r) 7 T. R. 344.

(s) Willes, 103. 264. n. a.

(t) 2 Burr II29. 13 John. 517.

(u) Ante, 455.

sumption would be that the goods are sufficient to satisfy the judgment, and it would be considered satisfied until the contrary appeared by an actual sale.(v)

The defendant may set off a debt due to him, although he agreed to pay it to the plaintiff in ready money.(w)

As to a set off by, or against assignees, vide ante, 35 to 37.

Where the plaintiff buys a negotiable note, after it falls due, he should give immediate notice to the maker, the same as if he had bought any other chose in action not negotiable ;(x) for being over due it stands on precisely the same ground, and should the maker acquire any set off against the payee, or other person transferring such dishonoured note, before notice of the transfer to the maker, as if he should get hold of a note or other chose in action against the payee,(y) or have dealings with him, and thus acquire a right of set off, he may avail himself thereof, either to defeat the plaintiff's recovery entirely, or diminish it according to the amount claimed as a set off, unless he have previous notice that the plaintiff is the holder ; and this, even though such matter of set off arose long after the plaintiff acquired both the legal and equitable interest in the note which he holds. This point was decided in *Benedict v. Dix*, in which case, Mr. S. G. Huntington was of counsel for the defendant, and myself for the plaintiff, Sup. Court, Oct term, 1817. M. S.

#### OF THE FORM IN WHICH THE SET OFF IS TO BE INTRODUCED.

In a court of record, this can only be by notice with the general issue, under the statute, 1 N. R. L. 315, s. 1. Vide 10 John. 396. 13 id. 9. And the same right of giving this notice of set off, as well as the right of giving the special matter in evidence under a notice with the general issue, granted by the same statute, (s. 1) and the right given therein by section 10, 1 N. R. L. 519, to plead several pleas,(z) is, I believe, universally understood to extend to a justice's court, under the clause investing the justice with all such power to hear, try, and determine causes, as is usual in courts of record in this state.(a)—The defendant in a justice's court, thus has a greater latitude in this respect, than he would enjoy in any other court ; for, by the 6th section of the 25 dollar act.(b) and the 4th section of the 50 dollar act,(c) he may plead and set off his demand. But as the

(v) 13 John. 517.

(w) 1 East, 375.

(x) Ante, 35.

(y) Ante, 37. Vide also ante, 460.

(z) Vide ante, 442.

(a) 1 N. R. L. 387, s. 1, & Sess. 41, ch. 94, s. 1.

(b) id. 389.

(c) Laws, sess. 41, ch. 94.



notice is obviously preferable, (d) besides being the most usual in practice, and answering every necessary purpose, (e) I shall omit the form of the plea. In point of form, this notice should be almost as certain as a declaration: (f) which, as a set off is but a substitute for a cross action, which it essentially resembles: and as the set off may and usually does, contain demands in general terms, like the common counts in a declaration (g) the plaintiff may ascertain the precise sums claimed, by calling on the defendant for the particulars of his set off, (h) in the manner we shall presently notice.

## NOTICE OF SET OFF.

Richard Roe,  
ads.

James Jackson.

} To the plaintiff in this cause.

Take notice, that the said D, will, on the trial of this cause, give in evidence and insist, that before, and at the time of the commencement thereof, the said P was and still is indebted to the said D, in \$100, for the work, labour and services of the said D, before then done for the said P, and for divers materials and other necessary things used and employed in and about the same; and for divers goods, wares and merchandize, before then bargained and sold, and sold and delivered to the said P, by the said D, and for money before then lent by the said D to the said P, and for other money before then paid, laid out and expended by the said D, to and for the use of the said P, all at his request, and for the balance of divers accounts, between the said parties, before then found due and in arrear to the said D, from the said P, on accounting by and between them; and for other money, before then had and received, by the said P, to the use of the said D, &c. (and so you may state any claim arising on contract, either written or by parol, &c. conforming, substantially, to the mode usually adopted in declaring, provided you were a plaintiff, instead of a defendant:) which several claims, the said D will set off and allow to the said P, against any claim or claims to be proved by him on the said trial; and claim judgment for such balance as shall there appear to be due to the said D. Dated the 1st day of Sept. 1820.

The rules, as to what may be given in evidence under these cross counts, included in a notice of set off, are the same as relate to a declaration.

(d) Vide Remarks of Cantine, Senator, 13 John. 24.

(e) id.

(f) Bulk. N. P. 179.

(g) Vide ante, 369 to 373.

(h) 5 Taunt. 233.

Where the defendant claimed but \$5, by way of set off, and the jury gave a verdict of \$15, in his favour, it was holden to be merely an error of form, and the judgment was, notwithstanding, affirmed for the whole \$15, with costs. *(i)* If the plaintiff do not appear, or if, after appearance, he submit to a non-suit, or go after a witness during the trial, but does not appear again, the justice has no right to allow the defendant's set off against him. (13 John. 469, 70.)

#### OF THE PLEA OF THE STATUTE OF LIMITATIONS.

##### *Form.*

That the several supposed causes of action, in the said P's declaration mentioned, did not, nor did either of them, accrue to the said P, at any time within six years next before the commencement of this suit, in manner and form as the said P hath, in declaring, complained. (Vide ante, 324.)

This plea applies to all actions cognizable in a justice's court, *(j)* with very few exceptions. These exceptions are mostly comprized in 1. An action on a judgment in a justice's court. *(k)* 2. On a judgment or decree of any other court in this state. 3. The action of covenant. 4. Debt on a specialty, or an indenture for the payment of rent. *(l)* 5. Debt or case against the sheriff, for the escape of a prisoner, committed to the gaol or gaol liberties, which last actions are limited to one year. *(m)* 6. Actions upon statutes, i. e. for a penalty imposed by statute for some offence, as for selling spiritous liquor without license, &c. &c. *(n)* And so, doubtless, upon the same principle, of an action of debt against a constable, for an escape, or neglect, &c. in serving an execution. But an action on a foreign judgment is within the statute. *(o)*

Actions, which concern the trade of merchandize between merchant and merchant, are excepted by the statute, *(p)* and although this exception extends to inland, as well as foreign merchants, *(q)* yet it does not apply to an account between a merchant and his customers. (Vide Esp. Dig. N. Y. ed. vol. 1, pt. 1, 282, 3.) But where there are mutual accounts current between two parties, and any one item of such account, on both sides, arose within six years before suit commenced, the statute does

*(i)* 3 John. 433.

*(j)* Vide 1 N. R. L. 186, s. 5.

*(k)* 14 John. 479.

*(l)* 1 N. R. L. 186, s. 5. 16 John.

210. 14 id. 479, 80.

*(m)* 1 N. R. L. 427, s. 26.

*(n)* 1 Saund. 36, 37, in notes. 14

John. 430, per Van Ness, J. Cro. Car. 513,

*(o)* Dougl. 1, & vide 14 John. 479, per Van Ness, J.

*(p)* 1 N. R. L. 186, s. 5.

*(q)* Vide 2 Saund. 127, b. c. n. 6.

not attach. These are not excepted by the statute, but arise out of the construction given to it, such late items being holden equivalent to an admission of mutual unsettled accounts, within the period of limitation.(r) On the other hand, the accounts excepted by the statute are not only open and current accounts, but they must relate to a direct concern of trade between merchant and merchant.(s) Or, as has been lately holden in Pennsylvania, between a merchant and his factor.(t)

Another exception in the statute is, of the rights of a person, who, at the time the cause of action accrues, is an infant, married woman, idiot, lunatic, or in prison, and a plaintiff whose claim is against a person out of the state at the time the cause of action accrues; in these cases the action may be brought within six years after the disability is removed.(u)

But this disability contemplated by the statute, must exist at the time the cause of action accrues, for if the statute once begin to run, any subsequent disability shall not excuse the want of a prosecution; as if, after the demand become due, the defendant leave the state, or the plaintiff become a married woman, a lunatic, or a prisoner, the statute runs notwithstanding, and though such disability continue for nearly all the six years, yet the lapse of time shall be a bar.(v)

Again;—Another exception is, that if the action be brought within six years, and the judgment therein be reversed, on error or certiorari, or arrested, (i. e. never rendered on account of some defect in the record on the part of the plaintiff,) the plaintiff shall then have one year after such reversal or arrest, within which to bring a new action;(w) and it has been holden, within the equity of the statute, that if the demand be not barred at a man's death, his executor or administrator may sue therefor at any time within a year after his decease, although the six years have elapsed before the commencement of the suit.(x)

#### HOW THE STATUTE MAY BE AVOIDED.

In the action of assumpsit, although the action be barred by the lapse of six years, yet a promise to pay,(y) or, indeed, the slightest acknowledgment of the debt or demand due to the

(r) 6 T. R. 189. 2 Mass. Rep. 217,  
& vide 2 Saund. 127. b. c. n. 6.  
(s) 2 John. 200.  
(t) 2 Yeate's Rep. 105.  
(u) 1 N. R. L. 186, s. 5.

(v) 1 8 John. 165. 1 John. 40.  
(w) 1 N. R. L. 186, s. 5.  
(x) Vide 1 Esp. Dig. N. Y. ed.  
pt. I. 286.  
(y) 4 John. 461.

plaintiff (z) within six years, will avoid the statute, and in *Cowp.* 548, *Ld. Mansfield* says, "The slightest acknowledgment has been held sufficient; as saying "prove your debt and I will pay you," "I am ready to account but nothing is due to you." "And much slighter acknowledgments, than these, will take a case out of the statute." But if the party, who acknowledges, say at the same time, that he intends to avail himself of the statute, he thereby saves his right, and may plead the statute in bar; (a) and whether a declaration, ambiguous in its import, amounts to an acknowledgment of the debt, is a question of fact for the jury, or the justice sitting in their stead. (b) The acknowledgment of the debt by one or two or more partners, or other joint debtors, will avoid the statute, as to the whole. (c) But a mere indorsement of part payment upon a note, bill or other contract, made within six years, will not avoid the statute, unless it be followed up with proof that the payment indorsed was in fact made, or that the indorsement was made with the defendant's consent. (d) or that it was made when it was against the plaintiff's interest to make it. (e)

If the plaintiff's action be for a fraud, or his action grow out of the fraudulent act of the defendant, the action may be brought at any time within six years next after the fraud is discovered. (f)

#### OF THE REPLICATION TO THIS PLEA.

We have just seen when the plaintiff's disability or the defendant's fraud may be replied in avoidance of the statute. The plaintiff need not, in general, either in his declaration or replication, aver that a new promise was made within six years.— But when this plea is pleaded, he may reply generally, "that the defendant did promise within six years, &c. in manner and form as the plaintiff bath, in declaring alledged;" thus taking issue on the defendant's plea, and then proof of any promise or acknowledgment, &c. will sustain the issue for the plaintiff. (g) When the plaintiff should state the new promise in his declaration, vide ante, 375.

Another mode of avoiding the statute is, to reply, (where this is the fact) that the suit was commenced within six years. What shall be the commencement of a suit, we have seen ante, 268;

(s) 2 Burr. 1099. Cowp. 648.  
Peake's N. P. Rep. 93. 4 East, 599.

(a) 11 John. 146.

(b) 2 T. R. 760.

(c) 6 John. 267. 15 id. 3. 1  
Taunt. 103. 4 Munt. Rep. 191.

(d) 17 John. 182.

(e) id.

(f) 3 Mass. Rep. 201. 4  
Yeates' Rep. 109.

(g) 17 John. 330.



and we have also seen ante, 413, that a suit shall not be deemed commenced by a warrant, until it is actually served.—Of course, this replication of a suit commenced, must be limited to the case of a summons or attachment. In courts of record, it is every day's practice to sue out process, and get the sheriff to return thereon, that the defendant is not found in his county, as a mere ceremony, by which the plaintiff may avoid the statute. He may then, at any time afterwards, sue out other process in the same court, and in the same cause, and the court will allow him to enter of record, fictitious continuances from the first process down to the last, <sup>(h)</sup> by which there appears a regular prosecution of the suit by process from term to term, till the defendant is finally arrested and brought into court for trial. A cause has been thus continued five, and even seven years. <sup>(i)</sup> But whether the construction of a justice's court will admit of this form, is perhaps questionable, although nearly the same thing, in substance, may be attained, by taking out and procuring the return of a summons. And should a summons be served by copy, and a warrant be thereupon issued, the suit would thereby seem to be continued in fact, for the warrant hath no return day. This is, provided the same warrant be ultimately proceeded upon, as it may be, even though the justice be unable to try the cause, as we have seen ante, 276. But in all other cases, a suit commenced in one court will not prevent the statute from attaching as to an action for the same claim in another court; but the original suit must be continued, and brought to a close, in the same court. <sup>(j)</sup> unless, indeed, the cause be removed to another tribunal by *habeas corpus* or *certiorari* before judgment, <sup>(k)</sup> which proceeding does not apply to a justice's court. <sup>(l)</sup>

OF THE IMPLIED LIMITATION OF AN ACTION ON A SPECIALTY.

Although the statute does not apply to an action on a specialty, yet a lapse of twenty years, without proof of any payment within that time, will create a presumption that the debt due by the specialty has been paid; as in debt, or covenant, on mortgages, bonds or indentures reserving rent, &c. <sup>(m)</sup> But such presumption may be explained away, as by showing a disability to sue, a promise, acknowledgment or part payment, &c. &c. at any time within twenty years. <sup>(n)</sup>

<sup>(h)</sup> 7 Mod. 5. 3 T. R. 662.

<sup>(i)</sup> 1 Vid. 53.

<sup>(j)</sup> Ld. Raym. 983. Balatine on Lim. 147. 1 Tennessee Rep. 362,

3, 4.

<sup>(k)</sup> Sira. 719.

<sup>(l)</sup> 1 N. R. L. 396, s. 17.

<sup>(m)</sup> 16 John. 210.

<sup>(n)</sup> id. & 10 id. 417.

## PLEA OF A RELEASE.

That after the plaintiff's cause of action in this suit had accrued, to wit, on, &c. the said P, by his certain writing of release, sealed with his seal, (and now shown to the court here,) the date whereof is the same day and year last aforesaid, did remise, release, and forever quit-claim, unto the said D, all manner of action and actions, cause and causes of action and actions, &c. (*in the language of the release*) both at law and in equity, or otherwise howsoever, which he the plaintiff then had, &c. (as in the release) as by the said writing of release will appear.

Though the proper words of a release are *remise, release and forever quit claim*,<sup>(o)</sup> yet, any words showing an intention to discharge a debt or duty, will amount to the same thing, (e. g.) the words *renounce, acquit*, or if the plaintiff *grant* that the defendant shall be *discharged*, &c.<sup>(p)</sup> A release by *parol* will discharge a promise or even a covenant *before breach*,<sup>(q)</sup> but *afterwards*, such release must be under seal.<sup>(r)</sup> And a release by one of several persons, having a joint demand, is valid against all,<sup>(s)</sup> even though such demand be the proper subject of *trespass* or *case*, as for a *wrong*.<sup>(t)</sup> And a release of a witness, in order to render him competent, if duly obtained, will discharge him of the claim released, though he be not sworn on the trial.<sup>(u)</sup>

As to the words which relate to the thing released, a release of *all demands* is the best, excepting the word *claim*; for the word *demand* is the largest word in the law excepting the word *claim*, and discharges all sorts of actions, rights and titles, conditions before or after breach, executions, rents of all kinds, due or to become due, covenants broken, annuities, contracts, recognizances, commons, bond to pay money not yet due; but not a bond to perform an award, when the money awarded is not yet due, nor a covenant unbroken; for this last should be released by the words *all covenants*.<sup>(v)</sup> Nor will a release of *all demands* discharge a claim for money afterwards paid by the releasor, as surety for the releasee.<sup>(w)</sup>

(o) Litt. s. 445. Co. Litt. 264.

(p) Plowd. 140. 1 Sid. 265. Cro. Jac. 696. 9 Co. 52. Show. 221.

(q) Bac. Abr. tit. Release. (A) p. 682. 14 John. 330. 7 id. 207. 17 id. 169.

(r) 7 John. 169.

(s) 14 id. 172 13 id. 286. 3 id. 68. 17 id. 58.

(t) 13 id. 286.

(u) 16 id. 270.

(v) Vide Bac. Abr. tit. Release. (I) & authorities there cited.

(w) 17 John. 169.

A release of *all actions*, extends to a bond to pay money in future, *all causes of action* and *all actions* which the releasor has, either in his own right, or, as executor or administrator, but not to a debt before the day of payment, nor to executions, though a release of *all suits* would bar an execution; and a release of *all quarrels* is as beneficial as *all actions*. But if a man wrongfully take away my goods, and I release to him *all actions personal*, yet I may take the goods out of his possession.(x)

*A release is sometimes implied by law.*

Thus, if a man covenants with, or gives a bond to another never to sue the demand which he has against him, this operates as a release, in order to avoid the circuity of action in first suing for the demand, and then turning round and suing, and recovering the same amount back again on the covenant or bond.(y) But this would be otherwise, if the covenant be not to sue until a certain time.(z)

Again—A release to one of several persons, who are indebted *jointly*, or *jointly and severally*, discharges the whole.(a) But a covenant by the creditor not to sue one of several debtors will not have this effect;(b) nor will a receipt in full on one of the debtors paying his share of the debt.(c)

Again—If a creditor appoint his debtor an executor, this extinguishes the debt *at law*, and so, if the debtor marry the creditor.(d)

#### PLEA OF ARBITRAMENT AND AWARD.

*Form of, on bond.*

That, after the said P's said cause of action arose, to wit, on, &c. the said P and the said D submitted themselves, that is to say, by two mutual bonds of arbitration, dated the day and year aforesaid, to the arbitration of, and engaged, in all things, well and truly to stand to, obey, abide, perform, fulfil, and keep the award, order, arbitrament, final end and determination of A, B and C, arbitrators indifferently elected and named, as well by and on behalf of the said P as the said D, to arbitrate, award,

(x) Vide Bac. Abr. tit. Release.(I) & authorities there cited.

(y) id. (A) 2. 2 John. 186. 8 id. 54.

(z) id.

(a) 7 John. 207. 2 id. 448.

(b) id. & 6 Taunt 289. 8 Mass. Rep. 423.

(c) 7 John. 207. 2 id. 448. 8 Mass. Rep. 423. 6 Taunt. 289.

(d) Vide Bac. Abr. tit. extinguishment.(D) 2 John. 471.

order, judge and determine, of and concerning all, and all manner of action and actions, &c. (as in the bonds,) so as the said award, &c. (as in the bonds.) And the said Davers, that before the time limited in the said bonds, for making the said award, to wit, on, &c. the said arbitrators, taking upon themselves the burthen of the said award, and, having duly considered the subject matters submitted by the said bond, did award, &c. (as in the award) as by the said award, dated the day and year last aforesaid, under the hands and seals of the said arbitrators, will more fully appear.

If the submission be by agreement, written or sealed in any other form, or by parol, state it according to the truth of the case.

Such submission and award is final, and conclusive between the parties, as to all the matters embraced by the terms of the submission. whether the same be *actually* submitted and passed upon at the hearing or not, whether such submission or award be by writing or parol. Thus, should the parties submit all demands between them, and the arbitrators make an award thereupon, and the party, by mistake, should omit to bring any one of his demands, though entire and distinct, before the arbitrators, yet he cannot afterwards sue for it.<sup>(d)</sup> And so if the arbitrators commit a mistake,<sup>(2)</sup> John. 62,) except in Chancery, where relief may be obtained in these cases.<sup>(id.</sup> 3 John. 367. 9 John. 212.) An award under a submission, is thus more powerful in extinguishing the claims of the parties, than a verdict under a declaration, be it never so broad; for we have seen, that the plaintiff may, on the trial, withdraw and reserve an entire demand for future litigation,<sup>(e)</sup> but in an arbitration, like the defence in *Le Guen v. Gouverneur and Kemble*,<sup>(f)</sup> every thing which may be heard and determined on either side, is for ever extinguished, and cannot be litigated again. Very little form is necessary, either in submitting or deciding by arbitration, those controversies which are cognizable before a justice. The parties are, either in writing, or by parol, to agree on such men as they choose, consisting of what number they please, to settle their disputes, whose duty it is, when convened, to hear the proofs and allegations of the parties, as nearly according to the rules of law as may be; but even a mistake of the law, or the rules of a court of equity, will not vitiate their award.<sup>(g)</sup> The parties may agree to submit to them all *claims, demands, actions, suits, quarrels, &c.* between

(d) 12 John. 311.

(e) Ante, 450, 1.

(f) Ante, 456.

(g) Ambl. 245. 3 Atk. 495. 6 Ves. Jun. 232. 2 Eq. Ca. Abr. 80. 3 Caines, 166.



them, the extent of which terms were considered, when speaking of a *release* ;(h) or they may limit the submission to any specifick subject, to which the arbitrators are bound to adhere strictly, like an attorney to his power ;(i) or the award is utterly void, at least so far as the powers of the arbitrators appear to have been transcended on the face of the award. And if it appear either by the award or otherwise, that they awarded upon a matter not submitted, and their award thereupon cannot be separated from such parts thereof, as might otherwise be valid, but all are intermixed, the whole award is thus tainted and void.(j) However, there is no doubt, that an award imposing distinct duties, in distinct parts, may be good as to part, and bad as to part.(k)

A very usual mode of submission, where the controversy is not complicated, is, drawing mutual promissory notes sufficient to cover the amount or balance claimed on either side ; and agreeing that the arbitrators shall indorse down, or deliver up both or either of the notes as they shall award. A note thus passed upon, and indorsed down, so as to meet what one party ought to recover against the other, has been adjudged binding and valid as a promissory note.(l)

If there be several arbitrators, and it be intended that the voice of a majority, or any number short of the whole, should bind, this should be explicitly agreed upon by the parties ; otherwise the decision of a majority, &c. would be void, and the whole controversy would remain open as before.(m) But, on a submission to two, who, on disagreement, are to appoint a third an umpire, a decision of two out of the three is valid. (13 John. 187.)

The arbitrators being the chosen judges, the delegates and agents of the parties, may bind their principals to do any act touching the matters submitted, which the parties themselves might agree to do, unless, indeed, it be that the party shall cause some third person to do an act, which it does not appear he has a right to require of him.(13 John. 264.) But their award must not only be made within the time limited, unless extended by agreement,(n) but they should see that both parties have notice of the time and place, when and where they meet to hear, &c. They may adjourn from time to time, giving such notice, &c. And may even decide *ex parte*, should the parties

(h) Ante, 468, 9. & vide 2 Caines, 320. 9 John. 38.

(i) 6 John. 13.

(j) 16 John. 227. 2 Caines, 235.

(k) 2 Caines, 235. 13 John. 264.

(l) 3 Caines, 166.

(m) 6 John. 39.

(n) Kyd on awards, 96.

or either of them refuse to attend. Where no time is limited, within which they are to award, they may take their own time ;(o) but their powers are always liable to be revoked by either party, at any time before the award is made. This revocation must be according to the submission, either by parol or under seal, and no particular form is necessary.(p) A submission by bond, or other instrument under seal, cannot be revoked by parol.(q) The party revoking, is liable to a suit on the bond of submission, or an action on his agreement to submit, in which the expenses, costs and charges of the opposite party about preparing for the hearing may be recovered as damages ;(r) unless indeed, where there is no time limited for the award. In such case, the party may request the arbitrators to award in a reasonable time, and if they will not do this, a revocation will neither be a breach of the condition of the bond, nor of the agreement to submit.(s)

As to the award itself, the only rule worthy of much notice here, is, that it be certain, i. e. the act awarded to be done, and the thing about which it is to be done, should be so far pointed out, that any one can see, or find out what steps are to be taken in performing it ; and, accordingly, an award to finish *the house*, or to pay for *the stove*, without saying what house or what stove, is void for uncertainty.(t) So, an award to pay the costs of the arbitration, without saying how much ;(u) so an award to give *good and sufficient security*, without defining the nature of the security.(v) And so of the like cases.(w)

The above directions with the forms which are in almost every body's hand, will, generally, be a sufficient guide in conducting the proceedings of an arbitration.

By the 28th section of the 25 dollar act,(x) it is made lawful for a justice, on proof by the party, that a submission to arbitration has been made, to issue a subpoena to compel the attendance of witnesses, before the arbitrators ; and on default of their attendance, to punish them in the same manner, &c. as if the default had been in their attendance before the magistrate, on complaint of any person aggrieved by such default ; and by the act, sess. 39, ch. 210, s. 1, a justice of the county in which the

(o) id.

(p) id. 32, 3.

(q) 3 John. 125.

(r) 16 John. 209, per Spencer,

Ch J, 1 Sid. 231. Bac. Abr. Arbitrament &amp; award, (B) 2 Keb. 10, 20, 24.

(s) 2 Keb. 10, 20.

(t) 2 Caines, 235.

(u) id.

(v) 9 John. 43.

(w) Vide this rule farther exemplified by the cases cited in Kyd on awards, 123, 4, 128, 194, 196, 7,

(x) 1 N. R. L, 399.

submission takes place, either by bond or other agreement, written or parol, is authorized to swear the witnesses required to give testimony before the arbitrator, or arbitrators, &c.

On application to a justice for a subpoena, to compel the attendance of witnesses before arbitrators, he is to take the requisite proof of the submission in the first place. This may doubtless be by the oath of the party himself, for his interest, if he have any, would, in this instance, be too remote to affect his competency.

#### *Form of the oath.*

You shall make true answers to such questions as I shall put to you, touching the necessity and propriety of my issuing a subpoena, upon your present application therefor. So help you God. (y)

On being satisfied from the answers of the party, under oath, that a submission, &c. has been made, a subpoena issues in the form which I shall give hereafter, except that instead of requiring the witnesses' attendance *before the justice, to testify in a plea, &c. between parties, plaintiff and defendant, &c.* the subpoena should, in this particular, run thus :

"To appear before A, B and C, arbitrators, (or A, arbitrator,) chosen to arbitrate and award, of and concerning certain matters in difference, between D of the one part, and E of the other part, at, &c. on, &c. to testify what you know, touching or concerning the said matters in difference, on the part of the said D."

The form of proceeding to, and drawing up a conviction, and the imposition of a fine, which I shall hereafter give for non-attendance before the magistrate, will be a sufficient guide in the case of disobeying a subpoena to attend before arbitrators, with this addition, however, that it should, in the latter instance be stated, and appear upon the face of the conviction, that it is *on the complaint of the person aggrieved by the default, that is, some person in whose behalf the subpoena issued, naming him;* whereas in the former, no complaint is necessary.

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(y) Vide ante, 256.

*Form of the oath, to be administered by the justice to a witness, before arbitrators.*

The evidence you shall give to these arbitrators, (or this arbitrator,) touching or concerning the matters in difference submitted for their (or his) determination and award, by and between D. of the one part, and E. of the other part, shall be the truth, the whole truth, and nothing but the truth. So help you God.(z)

The arbitrators are, sometimes, sworn by the justice, or some other officer authorized to administer oaths. Whether they are so or not, is, generally, left to the choice of the parties, (though it is not essential, or indeed any way important to the validity of their award, that they should be.) If an oath is preferred, the following may be the form :

*Form of the oath, to be administered to the arbitrators.*

You, and each of you, do swear, that you will well and truly hear and determine the matters in difference submitted to you as arbitrators, by and between D, of the one part, and E, of the other part, and a true award thereof make, to the best of your knowledge, understanding and ability. So help you God.(a)

#### ACCORD AND SATISFACTION.

This is another remedy by the act of the parties. Instead of calling in the aid of arbitrators, they adjust the difference themselves, determine what the party in default is to do in satisfaction of the claim, or demand against him ; and when such agreement is executed, it is a complete bar of an action for the demand thus satisfied, and may be set up as a defence therein, by a special plea, the same as a former recovery, or award. The settlement or agreement, to take up satisfied with such an act or thing is called an *accord*. When the act is done, or the thing is actually delivered, or paid, pursuant to the *accord*, this becomes a *satisfaction* ; for the demand is then not only settled but satisfied. This is distinguishable from payment or performance, which are always in fulfilment of some contract between the parties in the very terms of the contract, at least in kind, though not perhaps strictly at the day ; whereas accord and satisfaction is the substitution of some collateral thing in lieu of payment or performance, either before or after

(z) Vide ante, 256.

(a) Vide id.



a breach of the contract ; or it may be the receipt of a sum of money, or other thing, in satisfaction for some wrong.(b)

## FORM OF THE PLEA.

That after the cause of action stated in the declaration of the said D arose, viz. on, &c. the said D delivered to the said P, one silver watch, and the said P then received the same, in full satisfaction and discharge of the claim set forth in the said declaration.

This plea can easily be adapted to the delivery of any other article, or a sum of money, promissory note, or the assignment of a chose in action, or the performance of any other act in satisfaction, &c.

Accord without satisfaction is no bar. Thus, though the plaintiff had agreed to take a watch, as in the last plea, this alone would not bar the action, even though the watch had been tendered and refused.(c) It is true that some of the judges thought in the case in 3 John. cas. 243, that where the agreement to make satisfaction is such as to afford a remedy upon it by action, a tender alone is sufficient ; that case, however, is better put upon the ground that the plaintiff had done therein what was equivalent to an actual acceptance.(d) The assignment and acceptance of a chose in action is a good satisfaction.(e) Payment of a less sum, after a debt is due, in satisfaction thereof, is not a good plea ;(f) though a payment of the whole debt without the interest would bar the action ;(g) and so would a payment of a less sum, if made and received in satisfaction of the debt before it falls due.(1) Where the plaintiff agrees to receive any thing in satisfaction of his claim, a delivery thereof to a person appointed by him to receive it, is equivalent to a receipt thereof by himself, and shall be adjudged a satisfaction.(2)

## OF THE PLEA OF TENDER.

FORM—in *assumpsit* on a contract to pay money.

As to all the claim of the said P, mentioned in his declaration, except \$10, parcel of the amount claimed by the said P, the said D says, that he did not undertake and promise in manner

(b) & vide 3 Blac. Com. 15, 16.  
9 Co. 79.

(c) 2 T. R. 24. 2 H. Bl. 317. 5  
John. 386. 3 John. cas. 243.

(d) Vide 16 John. 88, per Spencer,  
Justice.

(e) 5 John. 386.

(f) id. 271. 17 John. 169.

(g) 5 id. 271.

(1) 2 Lev. 81.

(2) 16 John. 86.

and form as the said P hath above thereof complained. And as to the said \$10, the said D says, that after the said \$10 became due, and before the commencement of this suit, to wit, on, &c. he was ready and willing, and offered and tendered to pay to the said P, the said sum of \$10, to receive which, the said P then and there refused; and the said D has always before, and ever since the time of the said tender and refusal been, and still is ready to pay the said P, the said \$10, and now brings the same into court, ready to be paid to the said P.

In like manner, a tender may be pleaded to part, and a set off to the residue, or a payment, and the statute of limitations, &c. and these pleas may be adapted either to the whole declaration, or to the separate count to which they are thought proper to be applied. In what cases a tender shall be deemed inconsistent and inadmissible with other pleas, vide ante, 442. 4 T. R. 194.

The above form, with the remarks which follow, may also with a little variation, be applied to a sealed contract for the payment of money.

*Plea of tender in specific articles, to an action on the following promissory note.*

“LISBON, December 6th, 1815.

“For value received, we jointly and severally promise *Samuel Avery and Son*, in sixty days from date, seven hundred thirty-four dollars, seventy-six cents, in cotton yarn, at ten *per cent.* below the wholesale factory prices, to be delivered at the *Lisbon cotton factory store*.

*Josiah Rose, as ag't L. C. F.  
Alexander Stewart.”*

That the 4th day of February, 1816, was Sunday; (h) that on the next day, the said D having waited at the said store, until the uttermost convenient hour of the day, did then, to wit, between 3 o'clock P. M. and sun set, offer and tender to the said P, in cotton yarn, of a good and merchantable quality, warp and woof, at ten *per cent.* below the wholesale factory prices, in value \$734.76. that is to say, 10lb. No. 20—10lb. No. 19, &c. (specifying the numbers and the weight of each,) in full payment and satisfaction of the note in suit; which the said P refused to receive; and that the said D carefully deposited the said yarn, thus tendered, in the said store, and there left the same for the use and benefit of the said P, as their proper goods and estate.

Vide this plea in substance, in 2 *Connecticut Rep. New Series*, 69, 70. It is clearly not necessary, as was done in that plea, to state that the defendants notified the plaintiffs of the time and place of delivery, and that they refused to attend, &c. For the time and place is specified in the note. (*id.* 74, per Edmund, J.)

There is a material distinction between the effect of a tender in money due upon a contract, and a tender of *specific articles*. In the former case, "though a tender be made, and the plaintiff refuses the money, yet the tender cannot be pleaded in bar of the action, neither in debt nor assumpsit, but in the bar of the damages only, (i. e. interest and costs;) for the debtor shall nevertheless pay his debt. (*i*) But the consequences of a regular tender and refusal, where the articles are cumbersome, and will subject the party tendering to a charge in order to keep them, as cattle, or any articles requiring ware house room, which, indeed, embraces almost every article except money, are a complete discharge of the contract for delivery, and the party is not bound to hold himself ready, or as the common saying is, *to keep the tender good*, as in case of money; but he holds the articles as bailee, at the risque of the person to whom they have been tendered, subject indeed to be demanded of him, or any other person into whose hands they may come, and if refused, an action of trover will lie for their value. (*j*) If the tenderor dispose of the goods he will be answerable for the avails; (*k*) but he is not responsible for their safe keeping; (*l*) his duty, in this particular, bears a very near resemblance to that of an accidental finder of goods, mentioned ante, 186. The property of the goods being vested by the tender in the tenderee, an action of trover would, of course, lie against any person who should convert them to his own use.

Under this head, I shall consider,

### I. *By whom a tender may be made.*

A tender made by a servant, or by a stranger, on the behalf, and at the desire of the party owing the money, is as good as if it had been made by the party himself. (*m*)

### II. *What is a good tender.*

This relates, 1. To the manner of tendering. It is not enough for the person who intends to make a tender, to say, "I am

(*i*) 1 *Ld. Raym.* 254. 17 *John.* 253, per Spencer, Ch. J. 3 *John.* cas. 249. Vide *Bac. Abr.* tit. Tender, &c. (*C*)  
(*j*) 8 *John.* 474. 3 *John.* cas.

249. *id.* 458, per Kent, Ch. J. 12 *John.* 274. 1 *Hayw.* 142.  
(*k*) Vide 3 *John.* cas. 149. &c.  
(*l*) *id.*  
(*m*) *Cro. Eliz.* 48.

ready to pay the debt, or perform the duty," but he must make an actual *offer to pay* the one or *discharge* the other. *(n)* And the tenderor should moreover declare upon what account it is made; *(o)* and a declaration of being *ready* to pay, but keeping the money in a bag under the debtor's arm is not such an offer as amounts to a tender, *(p)* though it would have been good, if the bag had been *offered* with the money in it, provided the tenderor be able to prove that the amount is sufficient; for it is the duty of the tenderee to tell it, and examine its goodness. *(q)* However, the actual production of the money may be dispensed with by the conduct of the tenderee, *(r)* as if he refuse it because it is too much, or because it does not amount to the debt due, together with another debt not due the tenderee, but which he insists on receiving, or where he tells the tenderor he need not give himself the trouble to produce the money, for some reason which he assigns, or without assigning any reason, *(s)* or insist that more is due; *(t)* but notwithstanding a refusal to accept by the tenderee, yet the tenderor must show that the money is ready about him, in his pocket, or his desk which is present, &c. or the refusal will not make it a good tender. *(u)* There must be an *offer* of the money, unless it be dispensed with by the *express* declaration, or equivalent act of the creditor; *(v)* and then, a *mere* offer to pay is not sufficient; *(w)* for saying "here I am ready," will not do. He must have the money ready also. *(x)* And though there be a refusal to receive the money, an offer to pay must not be merely *theoretical* by words, but it should be a *practical* offer by producing the money, or showing it ready for delivery, at least. Indeed, it is unsafe to dispense with its actual production, by the hand of the tenderor, *(y)* unless, indeed, he be told expressly, not to produce it. *(z)* A refusal to receive, must, at any rate, be *absolute*, in order to dispense with the production of the money: refusing, till the creditor consult his attorney, is not a refusal in law. *(a)*

With regard to a tender of specific articles, such as stock in the funds, &c. or any other chose in action, the subject of an assignment, or of cattle, grain, articles of manufacture, goods, or other choses in possession, all the authorities agree that the par-

*(n)* 1 Leon. 71. 2 Lev. 209. 3 id. 104. 12 Mod. 353. 2 Dall. 190.

*(o)* Latch, 70.

*(p)* Noy, 74.

*(q)* 5 Rep. 115. 1 Inst. 208. Vide 5 T. R. 432.

*(r)* 3 T. R. 683. Peak N. P. Cas. 88. 4 Esp. Rep. 68. 5 id. 48.

*(s)* 4 Dall. 327.

*(t)* 3 T. R. 683.

*(u)* Peak N. P. Cas. 88.

*(v)* 5 Esp. Rep. 48.

*(w)* 10 East, 101.

*(x)* 2 Dall. 190, 91. 10 East, 101.

*(y)* 2 Hayw. 151. 1 Cox N. J. Rep. 174. S. P.

*(z)* 10 East, 103, per Bayley, J. 4 Esp. N. P. Rep. 67.

*(a)* id.

*(b)* 1 Cox N. J. Rep. 174.



ty making the tender, must do every thing in his power to place himself in a state of perfect readiness to perform, or the tender will not be complete, (b) whether the tenderee be present or not. Thus, where the consent of a director is necessary to the assignment of stock, it must be obtained, though the practice be to give consent of course; (c) and where a note is payable in shop work, the articles must be particularized and set out, otherwise the plaintiff would be barred of his action, by the tender without being able ever to recover the articles tendered, for want of being particularly distinguished and described. (d) We have just noticed, (e) that the effect of a tender is, to place the goods at the risk of the vendee, but while there remains any act to be done by the vendor, in separating the goods from others, with a view to determine their quantity or identity, or the price, the tender is incomplete; because, till this be done, they are not at the risk of the vendee, but the vendor. Thus, where the vendor was to count certain skins sold, in order to ascertain the price, under an agreement to pay so much for such a number; (f) or to weigh out certain flax sold, lying at the wharf, as part of a large quantity, from which it was not yet severed by the process of weighing, and the purchaser, therefore, could not know his part; (g) and so of a parcel of hemp sold, (h) it was holden that in these cases, the counting and weighing, respectively, not having been performed, the property did not pass, and, of course, a tender in either of these cases, could not have been insisted on. It is a general rule, that where any act yet remains to be done by the purchaser, to prepare the goods for delivery, until this be done, the property does not pass, (i) and the essential object of *identifying* the goods, and giving the tenderee a remedy for them by caption, trover or other action to obtain the goods, or the value of them, is not yet obtained. This is essential; for the party is not to be deprived of all remedy upon his contract, unless another remedy be furnished him by passing the property of the chattels and placing them completely under his controul. (j) "The distinction between executory and executed contracts is well defined; the former conveys a chose in action, the latter a chose in possession. In 2 Blac. Com. 443. 1 Com. on con. 3. 3 John. Rep. 388, 424. 3 John. Rep. 44. 5 John. Rep. 74. 10 John. Rep. 336, this distinction is stated and illustrated. The usual and decisive test in cases of this kind, is, to consider at whose risk the subject of the contract was." (k)

(b) 1 Str. 504. 3 John. Cas. 253,  
per Radcliff, J.

(c) 1 Str. 504.

(d) 1 Root, 443, 4.

(e) Ante, 477.

(f) 2 Campb. Rep. 240.

(g) 2 Maule & Selw. 397.

(h) 5 Taunt. 617.

(i) 15 John. 351, 2, & vide 12 East, 621. 13 East, 522. 6 id. 614.

(j) 1 Root, 443, 4. 5 John. 119.

(k) 15 John. 351, per Spencer, J.

A tender must be unqualified and without demanding a receipt in full, though this has been doubted. *(l)* But where a person owes debts to several different persons, who come together, and the defendant tenders them a gross sum amounting to all their claims, which they refuse, and insist on more being due, such a tender is sufficient. *(m)*

2. The thing tendered. If A be indebted to B, in divers distinct sums of money, he may make a tender of any one of the sums; *(n)* and indeed, the tender of part of an entire debt will stop the interest for so much as is tendered. *(o)* A tender of more money than is due, is good for what is due; for the greater includes the less, and it is at the peril of the tenderee, if he take more than is due; *(p)* and so it is good, though the money tendered be mixed with other moneys. *(q)* If the party be bound to tender certain goods, or a certain sum of money, at the election of the tenderee, at a day and place certain, the election of the tenderee to be made at such day and place, both the goods and the money must be tendered. *(r)*

In strictness, no money is a lawful tender, excepting such as is made current by act of Congress.

All gold, silver and copper coins, stricken and issued at the mint of the United States, in the manner prescribed by various acts of Congress, are a legal tender. *(s)*

These coins are of the following denominations, and of the value and weight annexed, in standard gold, silver or copper. *(t)*

#### GOLD COINS.

Eagles,	\$10.	to weigh 270 grs. in standard gold.
Half Eagles,	5.	135
Quarter Eagles,	2.50	67 1-2

#### SILVER COINS.

Dollars, to weigh	416 of standard silver.
Half Dollars,	208.

*(l)* 5 Esp. Rep. 48, & vide Peake N. P. Rep. 179. 1 Campb. Rep. 478, in note, 477.

*(m)* Peak N. P. Cas. 88.

*(n)* Bro. Tend. pl. 39.

*(o)* 1 Campb. Rep. 184, in note.

*(p)* 5 Rep. 115. Sira. 916.

*(q)* 3 T. R. 683.

*(r)* 1 Leon. 68.

*(s)* 2 L. U. S. new ed. 267, ch. 117, s. 16. Comb. 387. 1 Inst. 207. Salk. 446.

*(t)* 2 L. U. S. new ed. 265, ch. 117, s. 9. Vide also id. p. 501, s. 8, & President Washington's proclamation, reducing the weight of copper coins, in note. Vide also id. ch. 147, p. 327.

Quarter Dollars,	104	of standard silver.
Dimes, or tenths of a Dollar,	41 3-5.	
Half Dimes, or twentieths do.	20 4-5.	

## COPPER COINS.

Cents, or hundredths of a Dollar, to weigh 7 dwts. of copper.  
 Half Cents, 3 dwts. and 12 grs. of copper.

These coins, of full weight, are a tender according to the above values respectively, and those of less than full weight, of values proportional to their respective weights.<sup>(u)</sup>

There is no need of weighing these coins for the purposes of a tender : counting is sufficient. The stamp of the mint is *prima facie* evidence of their weight, and if the tenderee mean to object for want of weight, he must place his objection on that ground, and demonstrate it, by weighing the money himself and then refusing it, provided it fall short. The same rule prevails with regard to foreign money made current by act of congress, or by proclamation of the president, where he is duly authorized to make such proclamation by act of congress. And, I take it, that these principles are sanctioned by *Wade's* case, 5 Rep. 114, 15, though they were doubtless carried too far in that case ; for it is said in the 4th resolution, p. 115, that it is at the peril of the tenderee, not only that he count the money and ascertain its value, but that he inspect it and see that it is not counterfeit ; which latter has been overruled by our Supreme Court, in *Markle v. Hatfield*, 2 John. 455. Vide the opinion of Kent, Ch. J. id. 459.

## FOREIGN COINS, WHICH ARE A LAWFUL TENDER.

Spanish milled dollars, at the rate of 100 cents each, the actual weight whereof shall not be less than 17 dwts. and 7 grs. and in proportion for the parts of a dollar ;<sup>(v)</sup> and French crowns at the rate of 117 cents and 6-10 of a cent *per* ounce weight, or 110 cents for each crown, to weigh 18 dwts. and 17 grs. And French five franc pieces, at the rate of 116 cents *per* ounce, or 93 cents and 3 mills for each five franc piece weighing 16 dwts. and 2 grs.<sup>(w)</sup> These French pieces would have ceased being a tender, on the 29th April, 1819, to which the last cited act was limited, but by an act at the 2d sess. 15th cong.

<sup>(u)</sup> 2 L. U. S. new ed. p. 267, ch. 117, s. 16.

<sup>(v)</sup> 4 L. U. S. new ed. p. 29, 30, ch. 22, s. 1.

<sup>(w)</sup> 6 L. U. S. 117. 1 sess. 14 Cong. ch. 139, s. 1.

vol. 7th, of L. U. S. p. 92, they were continued current to the 29th April, 1821, at which time they would have ceased to be a tender; but I understand an act passed at the last session of congress, (1820 and 21,) continuing them a legal tender as above, till the 29th April, 1823, after which they are to be a tender "at the several and respective rates following, and not otherwise, to wit: at the rate of 107 cents and 8 mills for each crown weighing 18 dwts. and 17 grs. and at the rate of 91 cents and 5 mills for each five franc piece, weighing 16 dwts. and 2 grs. or for each, at the rate of 117 cents and 6-10 of a cent per ounce."

Those wishing to inspect more particularly the principles, progress, and mutations of our law of tender, will find all the acts on this subject except the three last above quoted, digested and referred to in the 5 vol. of the new edition of the laws of the United States—Index—title, *mint*, and *foreign coins*.

By these and the above quoted acts, he will perceive that foreign gold and copper coins have both ceased to be a tender in the United States.

A tender in bank notes is not good. But it seems such a tender may be made good if the tenderor accompany it with an offer to get cash for them. (x) And it has been ruled by the king's bench in England; (y) and was afterwards conceded by *Chambre*, J. in the Common Pleas, (z) that a tender in bank notes, if not objected to for that reason, i. e. *because they are bank notes*, is a good tender. And so, if the party agree before the day of payment to take bank bills, but when tendered refuse them, provided they are current. (a)

If the money in which a tender is legally made, afterwards become current at a less value, or even cease to be current at all, the tenderee must bear the loss; (b) but the plea ought to state specially the kind of money tendered, aver that the defendant was always ready to pay that very money, and he must bring the same identical money which he tendered into court upon his plea. (c)

It seems reasonable that any sort of goods should, unless they are to be delivered according to some sample, be made in a middling kind of goods of the sort. (d)

(x) 1 Crompt. Prac. 152, per *Ld. Mansfield*.

(y) 3 T. Rep. 554.

(z) 2 Bos. & Pull. 529.

(a) 7 John. 476.

(b) *Dyer*, 81. *Dav.* 27. *I Wash.* 29.

(c) *I Wash.* 29.

(d) 6 Bac. Abr. tit. *Tender*, &c.  
(B) 2.



A note is payable in plank, staves and heading : you must prove a tender of all three kinds, in order to bar an action ; and not of one or two kinds only, amounting in value to the note. (2. Hayw. 150.)

### III. *At what place a tender must be made.*

If a place of payment or performance be mentioned in the contract, the tender can only be made there. (e) If no place be mentioned for paying a sum in gross, it must be tendered to the party personally, if in the state, but the tenderor is not bound to seek the party out of the state ; and a tender to a mortgagee at his house, or at the place where the money was borrowed, if seasonable notice of a tender there be given, and is not objected to by the mortgagee, is good. (f) A tender of rent may be either to the person of the lessor, or upon the land demised, if no other place be mentioned in the lease ; (g) and a tender upon the land is good, whether the rent be payable in money, or any other article, *book accounts*, for instance. (i)

In the case of cumbrous articles, you are not bound to carry them with you to seek the person who is to receive them, but you must first seek him, and know where he will appoint to receive them, and there they must be delivered ; (j) or, if the parties meet, though accidentally, where the goods are at the proper time of delivery, they may be delivered there. (k) Should the creditor be called on to name a place of delivery, and refuse to do so, the debtor might, beyond all doubt, elect some reasonable place himself, which he should do, giving notice thereof to the creditor. (l)

### IV. *At what time a tender must be made.*

A tender cannot be made after suit commenced. (m) When a suit shall be said to be commenced, *vide ante*, 268, 413. For the effect of a tender upon a distress, or impounding thereof for rent, *vide ante*, 231, 2. Tender of amends for irregularity about a distress for rent, *vide ante*, 201 : of amends for an injury done by cattle, *damage feasant*, *ante*, 205.

If a debt is to be paid or goods delivered at a certain place, on or before a certain day, yet it has been decided that a tender

(e) *id.* (C) & authorities there cited.

(f) *id.*

(g) *id.*

(h) 16 John. 222.

(j) Co. Litt. 210. b. 8 John. 477.

(k) 8 John. 477. 1 Inst. 202, 211, 5 Rep. 114. Cro. Eliz. 14.

(l) *Vide* 1 Wash. 326, 3, 9.

(m) Cro. Car. 254.

cannot be made till the last day limited ;(n) but it has been determined by the Supreme Court of appeals in Maryland, that where a bond is conditioned to pay money *at or upon* a certain day, a tender before the day is good.(o) Be this as it may, where the tender is to be made upon a certain day, it must, in order to be regular, be made the uttermost convenient time of that day,(p) till which time the tenderor must wait, unless the parties meet there before, but the tender should be time enough before sun down to enable the tenderee to examine and tell the money or goods by day light.(q)

If no time of payment or performance be mentioned in the contract, it should be done presently, if the payment be in money : if it be in any thing else, as labour, or goods, &c. it should be made in convenient time, without prejudice to the doer or performer, according to the nature of the act. And in such cases, it is said the party should not wait for an actual demand,(r) which seems agreed by all the books, if the payment be cash. But the Superior Court of North Carolina has settled the following distinction on this subject.(s) "Where a promise is, to pay a sum of money, but no time is mentioned, it is due presently, and an action lies without any request.(t) But where, under the like circumstances, a promise is made to deliver goods, or do a collateral act, it is necessary that the party to whom it is to be done, should make a demand of the promisee before an action is brought." And upon this principle it was holden by the court, in the same case, that an action is not a sufficient demand for property lent, though the law implies a promise to return it on request ; but there should be an actual demand before suit.

There is also, frequently, some degree of nicety, in determining when a party would be warrantable in waiting for an actual demand, before tender, where the debt or duty is made payable *on demand*, or *on request*, &c. by the express words of the contract. The following seems to be the distinction in such cases : where I am bound, or engage, in any way to pay *money* on demand, or on request, there an actual demand or request need not be made, even though the money be payable on demand, at a particular place ;(u) but the bringing the suit is a sufficient demand in law ;(v) and there is hardly a single excep-

(n) 12 Mod. 421.

(o) 3 Harris & M'Henry, 65. id. 136, 7, 8.

(p) 1 Inst. 211. Plowd. 172, 3. 5 Rep. 114.

(q) id. 3 Lev. 104. 2 Con. Rep. N. S. 74, 76.

(r) 2 Lill. Abr. 572.

(s) Taylor's Rep. 149.

(t) & vide ante, 105.

(u) Ante, 103.

(v) Cro. Car. 304. Latch, 209.

tion to this rule, provided the money be due for a precedent debt or duty. (w) as is generally the case. But a promise to deliver goods, &c. on request, whether in consideration of a precedent debt or duty or not, as where I receive my pay for an article, and promise to deliver it on demand, or on request, is not broken without an actual demand. (x) And this is especially the case, where I receive goods on promise, either express or implied, to re-deliver or return them on request or demand: in these cases, an actual request must always be proved, to sustain an action for the damages, for non-delivery; (y) for here is not even a precedent debt or duty, besides the delivery being collateral to the obligation. (z) Yet this rule seems to be otherwise in an action of detinue for the goods, where it is said a demand, in law, by bringing the action, is sufficient. (a)

And an actual request, before action brought, is equally necessary upon an obligation to perform any other collateral act on request, or on demand, or to pay a penalty on request, as in the following and the like cases: to pay a penalty, on request for not performing an award; (b) to pay all the money another has expended for the defendant, on request; (c) to pay the debt of a stranger on request; (d) a promise to A to pay B \$10 on request; or if one promise to purchase on request; (e) to save a man harmless on request; or, on payment of \$10, to deliver a bond on request; (f) condition of a bond to make the plaintiff free of the joiner's company, on request, at the end of 7 years; (g) on a stipulation in a mortgage, that unless the interest be paid annually on demand, the mortgage shall be forfeited. (h) (Vide also, the cases cited in 1 Saund. 33, n. (2) by Williams.) And where notes for money drawn, payable at a particular place on demand, are declared by statute, to be considered payable on demand, at such place, an actual demand before suit is necessary, at the place specified in the note. (18 John. 341.)

Where no time is limited within which the request is to be made, the party may make it at any time during his life. (i)

Where a promise is, to pay on the happening of an event, which is, or may be as well known to one as the other of the parties, no notice or request is necessary. This is the case on-

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|-----------------------------------|---------------------------------|
| (w) 3 Salk. 308.                  | (d) Latch, 93. 3 Salk. 308.     |
| (x) 5 T. Rep. 409, & vide 6 Mass. | (e) 3 Salk 309.                 |
| Rep. 310. id. 358.                | (f) Cro. Car. 385, & 6. S. P. 2 |
| (y) 3 Salk. 309. Tayl. Rep. 149.  | Buls. 229. 3 id. 297.           |
| (z) 8 John. 478.                  | (g) 3 Salk. 309.                |
| (a) 3 Salk. 309.                  | (h) 2 Hen. & Munf. 95.          |
| (b) 1 Saund. 32.                  | (i) Cro. Eliz. 136.             |
| (c) Cro. Eliz. 73.                |                                 |

ly where the happening of the event is exclusively within the knowledge of the promisee.(j)

#### V. *To whom a tender must be made.*

This may be to a party or privy entitled to the thing tendered. Thus, a tender to an executor, even before he has proved the will, is good.(k) So to the assignee of the contract ; but not to a mere stranger ; yet on a bond to B, to pay him money for the use of C, a tender may be made to C, he being the one beneficially interested ; though where a bond is to B, to pay money to C, the penalty is not saved by a tender to C, for the condition is to *pay*, and C may thus by his refusal occasion a forfeiture of the bond. A tender of amends to a bailiff, who has distrained beasts, damage feasant, is not good, for he is a mere servant, having no power to deliver the beasts.(l) Going to the plaintiff's house, and delivering money to a servant who goes into the house, but comes back and returns the money, saying that the plaintiff would not receive it, but it must be paid to his attorney, was by *Ld. Kenyon*, left to the jury as evidence of a tender ; and the jury found for the defendant.(m)

It is no excuse for not receiving the money, that the claim is left with an attorney for collection ; and if a merchant's clerk should, for that reason, refuse the money, on its being tendered to him, though the merchant had ordered him not to receive it, it is notwithstanding a good tender to the principal.(n) And a tender of the money to an attorney, with whom the debt is left for collection, is good, even though the creditor revoke his power, of which the creditor is informed on the tender being made. Notice of the revocation should have been given before.(o)

#### VI. *The consequences of a tender and refusal.*

We have already noticed, in general, where the debt or duty remains, and when it is discharged by a tender.(p) In cases where the debt is not discharged, the tender must be kept good, i. e. the amount of money tendered, must be forth coming on its being demanded by the creditor ; or the benefit of the tender is lost ;(q) and a subsequent demand of one of two joint debtors, is good against both.(r) We have noticed, that

(j) 10 Mass. Rep. 230.  
(k) Vide Bac. Abr. tit. Tender,  
&c. (E)

(l) Vide id. & authorities there  
cited.

(m) 1 Esp. Rep. 349.

(n) 5 Taunt. 307.

(o) 18 John. 110.

(p) Ante, 477.

(q) Kirby, 293. 1 Dallas, 407,  
per M'Kean, Ch. J.

(r) 1 Starkie's Rep. 328.



a tender of money merely bars the right to interest and costs ; (s) and the debt remains even upon a bond with a penalty. (t) In such case, therefore, the money must be paid into court with the plea, or the defence is a mere nullity. (Str. 638. 1 Wash. 29.)

If the tenderor be ready at the place and time appointed to make the tender, and the tenderee do not attend to receive the money, or other thing tendered, it is the same thing, in effect, as an actual refusal. (u)

#### VII. *How a tender must be pleaded.*

Every requisite necessary to the validity of a tender, must be shown to have been complied with, or the plea, for want of showing that the party tendering has done all within his power to pay the debt or perform the duty, is not good.

Thus, the plea must not only aver a readiness, (and show how the defendant was ready, in a tender of specifick articles, 1 Root, 443, 4,) but it must aver an offer to pay or perform, not only at the day, but the uttermost convenient time of the day ; and if it do not appear from the plea, that the tenderer was absent, a refusal must also be averred ; and where the debt or duty is discharged by the tender, the plea may conclude by praying judgment, and that the plaintiff be barred of his action in the usual way of a plea in bar. In debt for money which has been tendered, you must conclude in bar of damages only, but in assumpsit, which sounds in damages, you are to conclude in bar of damages beyond the sum pleaded as a tender, and so, I suppose, of covenant. (v)

Where the debt or duty is not discharged, the defendant must also aver, that he has been always ready, from the time of tender and still is ready, though this would be obviously unnecessary where the debt or duty is discharged by the tender. And if a certain day be mentioned for payment, but no place specified, it is not enough for the defendant to plead, that the plaintiff was, at that day, out of the state, but he should also aver that he was ready to pay, and so has continued and still is ready, from the time of the tender. (w) Indeed, it is sufficient to observe, with regard to this plea, that it must show that the party pleading it has never been in default ; for

(s) Ante, 477. 12 John. 276, per Cur.

(t) 2 John. 24.

(u) Vide Bac. Abr. Tender, &c. (G)

(v) Vide Bac. Abr. Tender, &c. (H) 1, & cases there cited.

(w) id. 2, 3, & cases there cited.

if he neglect to tender the money at the proper day or place, and in the proper manner, his plea of tender is forever gone. (x) It should show that the plaintiff never had any cause of action ;(y) and always ready, is of the essence of the plea.(z)

And, accordingly, where you plead a tender for the price of goods sold, work, money, &c. or any thing properly demandable under common counts in a declaration, in which cases the debt is, in many instances, due immediately on the consideration being performed, it is enough to show your tender, and say, always ready, &c. but the plaintiff may defeat you by replying, and showing a demand, and neglect, or refusal to pay at any time after the debt arose, whether before or after the tender.(a)

When the money is brought into court on a plea of tender, the plaintiff is entitled to it at all events, even though he should afterwards be non-suited, or a verdict or judgment pass against him. And even if the money, or any part of it, be paid in through mistake, yet the court will not suffer it to be restored, either in whole or in part, if no fraud or deceit were practised upon the defendant, which led him to the mistake.(b)

#### VIII. *In what cases a tender may be made.*

It is sufficient, perhaps, to observe under this head, that, at common law, a tender cannot be made in any case, except where the debt or duty is certain or, which is the same thing, capable of being made certain by computation, or other act of the tenderor. It is, therefore, generally confined to contracts for the payment of money, or some other specifick thing. But where the damages must be assessed by a jury, as upon a contract to deliver certain specifick articles, without any price being affixed to them by the contract, a tender is inapplicable ; and the same distinction applies, in general, to the action of debt and covenant as well as to an action of assumpsit, as may be seen by the several cases cited in Bac. Abr. Tender, &c. (O) and (P) 1, 3, 4.

It follows, from the above rule, of course, that a tender is inadmissible in trespass on the case, properly so called, trover, trespass, &c. (id. tender, &c. (P) 2, 8, 9, and cases there cited.)

(x) 8 East, 169, per *Ld. Ellenborough*, Ch. J.

(y) *id.* 171, per *Lawrence, J.*

(z) *Willes, 624*, per *Abney, J.*

(a) 10 Mod. 81. *Willes, 632.* 1 Wash. 29.

(b) 2 Bos. & Pall. 392. 2 T. R. 645.

A tender, may, in general, be pleaded to the common counts in *assumpsit*.<sup>(c)</sup>

And by statute,<sup>(d)</sup> in trespass for breaking the plaintiff's close, the defendant may disclaim by plea or notice, with the general issue, any title or claim to the land, and aver by such plea or notice that the trespass was by negligence, or involuntary, and a tender of sufficient amends therefor, before action brought. And on such matter being found for the defendant, it is a bar to the action, and all other suits for the same trespass. (Vide the statute.)

It is doubtful, however, whether tender of amends can be pleaded for any other trespasses than those committed by cattle,<sup>(e)</sup> notwithstanding the plea in 3 Lev. 37. There the plea was not questioned upon this ground, but overruled upon another reason.

*Form of this plea.*

That the said D, at the times when the trespasses complained of by the said P, were committed, had not, nor claimed to have, nor hath he, nor doth he now claim to have, but disclaimeth to have, any title or interest in the closes, in which the said trespasses were committed; and he saith, that the cattle mentioned in the declaration of the said P, a little before any of the times when the said trespasses were committed, had, without the knowledge and against the will of the said D, strayed into the closes in which the said trespasses were committed, and at the said times when, &c. were in the said closes, in which, &c. doing damage there, as in the said P's declaration is mentioned, and the said D, at the said several times when, &c. in order to prevent further damage there to the said P, and to drive the said D's cattle out of the said closes, for that purpose entered the same closes by the most convenient and proper ways there, as he lawfully might, doing as little damage on those occasions, as he possibly could, which are the same trespasses in the said P's declaration mentioned; and further, that after the said trespasses were committed, and before the commencement of this suit, to wit, on, &c. the said D tendered and offered to pay to the said P, one dollar, in full satisfaction of the said trespasses, being then and there sufficient amends for the same, which the said P then wholly refused and still refuses to accept.

(c) Str. 576. Salk. 23. 597.  
6 Mod. 128.

(e) Vide 2 Chitty's pl. 521, & cases there collected in note (a)

(d) 1 N. R. L. 524, s. 22.

*Plea of infancy.*

That at the time of making the contract declared upon by the said P. the said D was an infant under the age of twenty one years.

When infancy is a defence, vide ante, 145, also ante, 426, 7.

*Plea—in trespass—Justification—taking and impounding cattle damage feasant.*

That the said D, before and at the time of the trespass complained of by the said P, was lawfully possessed of a certain close, situate in the town of *Saratoga Springs*, in the county of *Saratoga*, and because the cattle in the said P's declaration mentioned, before and at the said time when the said trespass is supposed to have been committed, were wrongfully in the close of the said D, there doing damage to him, he took the same cattle so doing damage, and drove them away out of the said close, to a common pound in the said town, which is the same trespass complained of by the said P.

If the beasts were impounded before the damages were appraised, the plaintiff should reply this matter, in order to make the defendant a trespasser from the beginning.

When and how cattle may be taken, damage feasant, and impounded, vide ante, 204 to 213. Also ante, 239, 40.

*Plea of justification by the party upon whose execution the plaintiff's goods were taken and sold.*

That the said D, before the said time when the trespasses mentioned in the said P's declaration, are supposed to have been committed, to wit, on, &c. at a court holden, (set forth the judgment, execution and delivery to the constable, as ante, 339, 40.) By virtue of which said execution the said T. N. so being constable as aforesaid, afterwards, on, &c. before the return day of said execution, at, &c. did seize and take the goods and chattels of the said P, in his declaration mentioned, for the purpose of levying the monies, so as aforesaid directed to be levied by the said execution, and did then and there levy a certain sum of money, to wit, the sum of ten dollars, part and parcel of the damages and costs aforesaid, which are the same trespasses whereof the said P, in his declaration, complains.



We noticed ante, 425, note (8,) that a justification under process must be pleaded by the party, though the officer himself, may generally justify under the general issue.

A constable appointed by three justices, may justify under such appointment, although it were improper; for it is a judicial act, and its validity cannot be drawn in question, in an action against the constable; (*f*) and so, though he seize goods on a warrant which issued erroneously. (*g*)

Where a constable is not acting in the execution of his office, or does not pursue the directions of his warrant or process, he is not authorized by the act. (ante, 424, note (8.) to introduce his defence under the general issue. (*h*) And where he executes a warrant in an unreasonable and oppressive manner, and with the avowed and malicious design to vex and oppress the party, an action will lie against him. As where a constable had a warrant to levy a fine, and refused to take the property which the plaintiff tendered him, but took his horse with the avowed intent of hurting his feelings, it was held that an action on the case might be maintained against him. (*i*)

Where the defendants justify under the same process, the safer way is to do so in separate pleas, each for himself; for if all the defendants justify under the same process, in a single plea, if the process will not justify them all, though some of them might be protected by it, the justification fails as to all, and neither of the defendants can be protected by it. (*j*)—But it is otherwise of a joint plea of not guilty; for here one defendant may be found guilty and another acquitted, though the plea be joint. (*k*)

*Plea—defect of line or partition fence.*

That the close mentioned in the said P's declaration, in which, &c. at the said time, when, &c. and now does lie next adjoining to a certain close of the said D, situate in the town, &c. the easternmost half of the division fence, between which said closes, the said P, at the said time, when, &c. was legally bound to keep in repair; but that at the said time, when, &c. the said easternmost half of the said fence was out of repair, by means whereof the cattle mentioned in the declaration of the said P, escaped from the said D's said close, into the said P's

(*f*) 8 John. 69.

(*g*) 2 Bos. & Pull. 158.

(*h*) 1 Bac. Abr. 690. 3 Burr.

1742. 3 East, P. C. 233.

(*i*) 5 John. Rep. 125.

(*j*) 2 Caines, 108. 1 Saund. 28.

n. (2) 14 John. 166.

(*k*) 14 John. 166. 1 Chitty's pl.

75. 3 East, 62. Cowp. 610.

said close, and did the damage complained of by the said P, which are the same trespasses complained of by the said P.

Of this plea, generally, vide ante, 204 to 213.

*Plea—close a publick highway.*

That at the time of committing the said several trespasses, in the said P's declaration mentioned, the said close in which the same are supposed to have been committed, was, and still is a publick highway; wherefore the said D, at the said time, when, &c. did, with his horses and waggon, pass along the said highway, as he lawfully might, therein using the same as a publick highway; and because the same was then and there obstructed by the said rails and posts, so that without the removal thereof, he could not pass as aforesaid, the said D, then and there removed the same out of the way, in order to pass along the said highway as aforesaid, which are the same trespasses, whereof the said P, in declaring, complains.(9)

For the rights of travel on a highway, vide ante, 203, 211, 112. When a river is a publick highway or common fishery, ante, 213 to 216.

If any part of the trespass or trespasses alledged, were not committed, plead the general issue as to so much, and your justification will then be "*as to the residue of the said trespass, or the said several trespasses, &c.*"

(9) "Highways are regarded in our law merely as easements. The publick acquire no more than a right of way, with the powers and privileges incident to that right, such as digging the soil and using the timber and other materials found within the space of the road, in a reasonable manner, for the purpose of making and repairing the road, and its bridges. When the sovereign imposes a right of way upon the land of an individual, the title of the former owner is not extinguished; but is so qualified that it can only be employed subject to that easement. The former proprietor still retains his exclusive right in all mines, quarries, springs of water, timber, and earth, for every purpose not incompatible with the publick right of way. The person in whom the fee of the road is, may maintain trespass or ejectment or waste. (1 Burr. 143. 2 Str. 1004. 1 Wils. 107. 6 East, 154. 2 John. 363. 6 Mass. Rep. 454.) But when the sovereign chooses to discontinue or abandon the right of way, the entire and exclusive enjoyment reverts to the proprietor of the soil. (15 John. 453, per Platt, J.) As to what constitutes a highway and when it shall cease or be discontinued, vide 2 N. R. L. 277. Laws, N. Y. sess. 40, ch. 43, s. 8. 7 John. 306. 2 id. 424. 3 Caines, 307. 10 John. 236. 17 John. 277.

## OF THE PLEA OF TITLE IN TRESPASS ON LANDS, IN ORDER TO OUST THE JUSTICE OF JURISDICTION.

In trespass on lands, if the defendant mean to avail himself of his title, or the title of any person under whom he entered, he must plead it and commit his plea to writing. *(l)* This must be done the very first opportunity, that is, at the time of joining issue in the cause; and the defendant has no right after having pleaded, and an adjournment upon an issue being joined, to withdraw his first plea, and plead title. *(m)* He should be careful to have his plea well framed, for by this plea he must abide, on a suit being commenced in the court of Common Pleas; and cannot then join it with any other plea *(n)* The common bar of *liberum tenementum*, or freehold in the defendant, will, in all cases, answer the purpose, let the title of the defendant be never so special, or even though he have no title, but the same be in a third person, and this, whether he entered under authority from that person or not. So that both the defence, and the evidence upon this plea is broader than at common law; for, until this statute, possession, though wrongful, would maintain trespass against the defendant, unless he could show a better title in himself, or the one under whom he entered; *(o)* and he was moreover bound to show his title in his plea according to the fact, if his claim was under a third person having title, who gave him license to enter, though simple freehold, or any possessory title in himself, might be given in evidence under the general issue. *(p)* But, by this statute, the defendant may plead the common bar *liberum tenementum*, and under this plea, when sued in the common pleas, he may show either, 1. That the plaintiff had not possession at the time of the trespass; or, 2. That though he had possession, yet that he had not title to the premises, the same being either the property of the defendant, or of any person other than the plaintiff. *(q)*

It seems fairly inferable from the case of *Heaton v. Ferriss*, 1 John. 146, that a justification under a right either of private way or public way, is a justification under a title to the land, the question arising under which a justice has no right to try. In that action the defendant pleaded both a public and private way, in separate pleas, which formed the subject of dispute at the trial, and the plaintiff having recovered six cents only, was

*(l)* 1 N. R. L. 390, s. 7.

*(m)* 15 John. 304.

*(n)* 2 Caines, 28.

*(o)* Vide cases cited, Esp. Dig. N. Y. ed. pt. 2, 289.

*(p)* Vide cases cited 1 Chitty's pl. 494, 5.

*(q)* 1 N. R. L. 390, *provisio* to s. 7. 2 Caines, 28. 7 John. 273.

yet allowed full costs under the statute giving a plaintiff such costs, *where freehold or title to lands or tenements shall in any wise come in question.*(*r*) But in *Otis v. Hall*, 3 John. 450, in an action on the case, for overflowing the plaintiff's land, by means of a mill dam, which the defendant insisted was erected by permission of the plaintiff, it was holden, that a question at the trial upon such mere permission or license, could not be said to concern the title to lands, &c. and though the plaintiff recovered, full costs were denied; though if the defendant had justified under a prescription(*s*) to overflow the lands, this would be a trial of title to lands.(*t*) In an action for a nuisance to a house, the title cannot come in question; for though the defendant have a title to the house himself, he has no right to drive the plaintiff out by erecting a nuisance.(*u*)

For what shall be said to be a question of title, generally; vide ante, 226, 7, and 230. When the question of title may arise incidentally, vide ante, 14, 15, 16.

#### FORM OF THIS PLEA.

*Liberum tenementum;—or freehold, in the defendant.*

#### JUSTICE'S COURT.

<i>Richard Roe,</i>	} Before Philip Green, Esq. one of the justices of the peace, in and for the county of Saratoga.
ads.	
<i>James Jackson.</i>	

PLEA.—And the said *Richard Roe*, in his proper person, comes and defends the wrong and injury, when, &c. and says that the said *James Jackson* ought not to have or maintain his aforesaid action thereof, against him; because he says, that the said close mentioned in the said declaration of the said *James Jackson*, and in which the said trespasses are therein supposed to have been committed, now is, and at the said time when the same trespasses are by the said declaration supposed to have been committed, was, the close, soil, and freehold of him the said *Richard Roe*, to wit, at the said town of Saratoga Springs, (*the town or ward mentioned in the declaration*) wherefore the said *Richard Roe*, in his own right, at the said time, when, &c. broke and entered the said close, in which, &c. and with his feet in walking, trod down the grass there growing, &c. (*enumerating the several acts alledged as trespasses which he means to justify*) as he lawfully might for the cause aforesaid, which is the same tres-

(*r*) 1 N. R. L. 344, s. 4, 2d proviso.

(*s*) What a prescription is, vide ante, 208.

(*t*) 2 John. 185.

(*u*) 13 John. 306.



pass whereof the said *James Jackson* hath above in his declaration complained. And this he is ready to verify. Wherefore he prays judgment, and that the said *James Jackson* may be barred from having or maintaining his aforesaid action thereof against him.

*Richard Roe.*

The foregoing plea, signed in my presence, and delivered me by *Richard Roe*, the defendant in the above cause, the 10th day of September, 1820.

*Philip Green*, justice of the peace.

This plea of title must be signed in the justice's presence, by the defendant, delivered to the justice, and countersigned by him in the above form. and then delivered to the plaintiff.<sup>(v)</sup> If there be several counts for entering *different closes*, the defendant may extend his justification to all of them,<sup>(w)</sup> by using in his plea the word, *closes*, instead of the singular, *close*. If the plaintiff alledge any act among the other trespasses, which the plea of title will not justify, as if there be a separate count for taking the plaintiff's personal property, without alledging an entry into his *land* or *close*, or if the entering the close and taking away, or injuring the plaintiff's personal property, are charged in the same count,<sup>(x)</sup> the defendant may, nay, should, in safety to himself, plead not guilty, and go to trial as to these, and plead his title in justification of the residue : in which cases the plea will run thus :

*In the 1st case.*—"As to the first count in the declaration, the defendant says, that he is not guilty of the trespasses therein mentioned in manner and form as is therein alledged."

"And as to the second count in the declaration of the said *James Jackson*, the said *Richard Roe*, in his proper person comes and defends, &c. (*as in the above plea of title, only referring to the particular count or counts which you answer by title, instead of the whole declaration.*)

*In the 2d case*—where two kinds of trespasses are blended in one count.—"As to the taking and carrying away the said hay in the plaintiff's declaration mentioned, the defendant saith he is not guilty thereof."

"And as to the residue of the trespasses in the declaration of the said *James Jackson* mentioned, to wit, entering the close

(v) 1 N. R. L. 390, s. 7. Penn. on small causes, 121.

(w) 6 John. 63.

(x) Vide ante, 390, 1.

and treading down the grass and cutting the timber mentioned therein, the said *Richard Roe* comes and defends, &c. (*justify by title as above*) which is the same residue of the trespass, whereof the said *James Jackson* hath above in declaring complained."

The defendant cannot plead that all the closes in the different counts of the plaintiff's declaration, are one and the same close, defining it, and then plead that that close was his freehold; but where he undertakes to define the close mentioned in the count, and justify under a title to the close thus specified, he should plead a separate justification as to each close.(y)

It is proper to notice before I leave this head, that in the second case above mentioned, where the plaintiff sets forth an entry into his close, and that act followed by certain other trespasses, as by expulsion of the plaintiff, or indeed any other act which would constitute a trespass in itself, independent of the entry, these things will generally be esteemed mere matters of aggravation; and whatever will justify the entry, will justify all matters alledged by way of aggravation; so that, though it is advisable to take issue on matters laid in aggravation, which are untrue, and justify under a plea of title to the residue, yet a plea of title justifying the entry, will generally reach all the acts following the entry, and justify them also, and if the plaintiff mean to avail himself of them in a justice's court, as independent trespasses, he must state them in a separate count, in which case we have just shown how to treat them, for he cannot new assign in a justice's court upon a plea of title.(z)

That what will justify the entry, will also justify the matters laid in aggravation, vide ante, 190, and *Taylor v. Cole*, 1 H. Bl. 555, the cases there cited by the counsel for the defendant, p. 560, and the argument of lord *Loughborough*, p. 561, 2.

But a plea of title is a mere nullity, and cannot be received by the justice, unless accompanied with a recognizance, as required by the statute, to be given or entered into by the defendant, together with one sufficient surety,(a) and whose competency the justice may inquire into on his oath, if he think this proper, in the manner we shall notice of bail for adjournment. Let him justify on oath in four times the amount of the penalty of the recognizance. If a satisfactory recognizance be not given, the justice is to proceed as if no plea of title had been interposed, and disregard all questions of title.(b)

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(y) 6 John. 63.  
(z) Ante, 386, 7.

(a) 1 N. R. L. 390, s. 7.  
(b) id.

*Form of the recognizance.*

SARATOGA COUNTY, ss.

Be it remembered, that on the 10th day of September, A. D. 1820, *Richard Roe* and *John Doe* personally came before me, *Philip Green*, Esq. one of the justices of the peace of the said county, and acknowledged themselves to owe and be indebted to *James Jackson*, in the sum of fifty dollars.(c) to be levied and made of their respective goods and chattels, lands and tenements, to the use of the said *James Jackson*, if default shall be made in the condition following; which is, that whereas the said *Richard Roe* doth stand prosecuted before me, by the above named *James Jackson*, in an action of trespass for breaking and entering a certain close, situate in the town of *Saratoga Springs*, in the said county (*describing it as in the declaration, vide ante, 386,*) and with his feet in walking, and with divers cattle, to wit, horses, &c. treading down and destroying the grass, &c. and eating up, trampling upon and destroying the corn, &c. (*as in the declaration, vide ante, 386,*) in bar of which action the said *Richard Roe* hath justified in a plea of title to the said close, in which the said trespasses are alleged to have been committed: Now, if the said *James Jackson*, before the next court of Common Pleas, of the said county, to be holden after the date hereof, for the recovery of damages for the said trespasses, and the said *Richard Roe* shall appear thereto and put in special bail in such court, within twenty days after the first day of the next term of the said court, to be holden after the date hereof as aforesaid, then this recognizance to be void, otherwise of force.

*Richard Roe.**John Doe.*

Taken and acknowledged, the day  
above written before me,

*Philip Green*, justice, &c.

It seems that there is no impropriety in the justice delivering this recognizance to the plaintiff with the plea, as they are both intended for his benefit.(d) This plea admits the trespass, and is conclusive evidence that the defendant means to rely upon the title only, to justify the trespass.(e) And if the plaintiff succeed, either in the Common Pleas, or on the action being removed into the Supreme Court, (as it may be by writ of *habeas corpus*) he shall recover against the defendant double costs.

(c) id.

(d) Vide Penn. on small causes, 28.

(e) 1 N. R. L. 390, s. 7. 2 Caines,

(f) The provisions of the above act in regard to a plea of title, are incorporated into the "act concerning injuries to common or public lands." (g)

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SECTION XII.

OF THE REPLICATION TO A SPECIAL PLEA IN BAR.

Every special plea in bar is, like a plea in abatement, (h) to be answered by a replication, either denying it, which is generally the case, or setting forth some new matter to avoid it, and support the plaintiff's action, notwithstanding its truth. Thus, to a plea of *distress damage feasant*, the plaintiff may reply, that the defendant abused the distress by working it, or impounded the cattle before having the damages appraised by the fence viewers; and so in all cases where the defendant interposes a plea, which justifies the trespass, and the plaintiff has matter which will either make him a trespasser from the beginning, or otherwise do away the justification, admitting its truth in the first instance, he must reply such matter specially, for, if he take issue upon the defendant's plea, he cannot avail himself of the matter in avoidance thereof. (i) And so wherever the plea is true, the plaintiff should reply the matter which avoids it, and leave it with the defendant to answer the replication by a rejoinder. (j)

Sometimes, too, where the defendant has pleaded matter which will meet the declaration in its general form, and operate as a defence, the plaintiff should new assign, i. e. describe the matter which he complains of, more particularly, so as to show that the justification or defence set up in the plea, will not apply. An instance of this was given ante, 387, in an action of trespass. Another instance is, where, in an action on the case for an escape, the defendant pleads a return before suit brought, the plaintiff, if there have, in fact, been an escape, and return before suit brought, must reply a subsequent escape, for otherwise, if he deny the plea, the issue will be with the defendant. (k) The revocation, or excess, of a license must also be replied. (l) And so of the like cases. (m)

(f) 1 N. R. L. 390, s. 7. 17 John.  
37.

(g) 2 N. R. L. 131, 2.

(h) Vide ante, 413, 14.

(i) Vide 1 H. Bl. Rep. 555.

(j) Vide 1 Chitty's pl. 600, 601.

(k) 1 B. & P. 413.

(l) 1 Saund. 300. a. 2 id. 5, conclusion of note, 3.

(m) Vide 1 Chitty's pl. 601 to 614.



In an action by a corporation, the defendant may plead *no* such corporation, in which case the plaintiffs must reply specially, showing how they were made a corporation, where the act incorporating them requires certain things to be done before they can become a corporation. *(n)*

To these replications there may be a rejoinder, and we have seen how the pleadings may thus be lengthened out to a surrebutter. *(o)* But this is rarely necessary. In these subsequent pleadings, it is essential, that the plaintiff allege matter supporting his first cause of action, and the defendant matter supporting his first matter of defence set up by his plea, and no new cause of action or defence can be insisted on. This is called a departure, and is a defect of substance, which may be taken advantage of by general demurrer. *(p)*



## SECTION XIII.

## OF DEMURRERS AND ISSUES,

A demurrer is an objection either to the substance or form of the pleadings of your antagonist, whether plaintiff or defendant. It confesses the fact to be true, as stated in the pleading demurred to ; but denies, that by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse, according to the party that first demurs. *(q)* Thus, should the plaintiff in his declaration, merely state, "*that the defendant had wilfully and maliciously injured him,*" without stating *how* and *when*, the defendant may demur to this declaration. So, where the plaintiff has set forth sufficient to maintain his action, suppose the defendant should state in his plea, "*that the plaintiff has released the cause of action by him set forth,*" without showing how, the plaintiff may demur ; and so for any defect, whether in the declaration, plea, replication, rejoinder, &c.

*(n)* 18 John. 137.  
*(o)* Ante, 323, 4, 5.

*(p)* 14 John. 132.  
*(q)* 3 Black. Com. 314.

*Form of a general demurrer to a declaration.*

Richard Roe, } The said D says, that the said P's declaration  
 ads. } is insufficient in law to maintain his action.  
 James Jackson. }

This may be to any particular count or counts of the declaration, when at the same time a plea may be interposed to other counts.

The above is called a general demurrer, because it reaches to matter of substance only. If you wish to take advantage of a want of form, as the want of stating a day for instance, where the matter is in other respects sufficiently stated, you should present your demurrer in the above form, and underneath assign, or point out the particular defect of form which you object to, otherwise it cannot be noticed on the argument.(r)

*Form of assigning causes.*

And for causes of demurrer, the said D says, that the said declaration omits to state any *day* or *time*, when the said trespass therein alleged was committed.

The demurrer is then called *special*. This distinction runs through all demurrers, whether taken by the plaintiff or defendant.

*Form of general demurrer to a plea.*

James Jackson, } The said P says, that the plea of the defendant,  
 v. } (or the 1st, 2d, or 3d plea, &c.) is not suffi-  
 Richard Roe. } cient in law to bar the said P's action.

The same form of demurrer will answer to any other pleading, substituting the words, *replication*, *rejoinder*, &c. for *declaration* or *plea*, according to the pleading objected to.

When a pleading on the part of the plaintiff is demurred to, he joins issue by answering, "that the pleading demurred to is sufficient to maintain his action," or if the defendant's pleading be demurred to, he joins issue by answering, "that the pleading demurred to, is sufficient to bar the plaintiff's action." This is called a *joinder in demurrer*; and an issue in law is then

joined, to be determined by the justice only ; for a jury cannot be impannelled except to try an issue of fact.(s)

Whoever commits the first substantial fault in pleading, shall have judgment against him. Thus, if a demurrer be put in to the plaintiff's replication, it avails not what faults there may be in the replication demurred to, if the plea in bar be defective in substance ; for the judgment on the demurrer must be against the defendant ; and so of the like cases.(t)

An issue of fact is, where the fact only, and not the law is disputed, as where the defendant pleads the general issue, or denies any particular fact stated in the declaration, or where a replication denies the facts stated in the plea, or a rejoinder denies the replication, and whenever, in pleading, a fact is affirmed on one side and denied on the other, it makes an issue proper to be tried by a jury,(u) within the meaning of the statute, which authorizes the justice to issue a venire on the demand of either party.(v)

The distinction between an issue of *law* and of *fact*, and the judgment thereupon, is *logically* exemplified by Sir Wm. Blackstone,(w) by the introduction of the following *sylogism* :

*Against him who hath rode over my corn, I may recover damages by law ;*

*But A hath rode over my corn ;*

*Therefore I may recover damages against A.*

If the *major* proposition be denied, this is a *demurrer*, and forms an *issue of law* : If the *minor*, it is then an *issue of fact* : But if both be confessed (or determined) to be right, the *conclusion* or *judgment* of the court cannot but follow.

We have now closed what we had to say on the subject of pleading, the great outlines or rudiments of which ought not only to be understood by the magistrate, but adhered to by the parties ; and this, more especially, since the introduction of appeals, in causes where the amount in question will warrant that proceeding. In passing from the justice to the Common Pleas, and so to the Supreme Court, the pleadings must stand or fall by their own strength, as in other actions at the common law ;

(s) 18 John. 140.

(t) 2 Wils. 100. 3 id. 234. 3 T.

R. 186.

(u) 16 John. 267.

(v) 1 N. R. L. 391, s. 9.

(w) 3 Black. Com. 396.

and cannot have the adventitious aid of the facts proved, as upon a return to a certiorari, which has resulted in an almost unlimited intendment in favour of their validity. Nor can it be known on appeal, what defects or variances, &c. were waived or passed over in silence in the court below. A little seasonable caution is, therefore, many times necessary to save a world of expense. These considerations will not only excuse the prolixity of this chapter, but show the necessity of examining its subject even more extensively than the limits of this treatise will warrant.



## CHAPTER VII.

### OF ADJOURNMENT.

The power to adjourn a cause, is derived entirely from the second, fourth, and fifth sections of the 25 dollar act. In treating of this subject, I shall consider, *first*, when, and for what time an adjournment may be granted ; *second*, on what terms, and when security must be given, with the form of the security ; and, *third*, when an adjournment amounts to a discontinuance of the suit.



#### SECTION I.

#### *WHEN AND FOR WHAT TIME AN ADJOURNMENT MAY BE GRANTED.*

This respects, 1. An adjournment upon the return of a summons or attachment ; 2. Upon the return of a warrant ; 3. Other stages of the suit.

1. On the return of a summons personally served, provided the plaintiff appear, the justice may, whether the defendant appear or not, adjourn the cause not exceeding six days, and this either on his own motion, or that of the plaintiff. If the defendant appear, the same thing may be done at his request ; but the justice cannot change the place of trial, unless the defendant appear.<sup>(x)</sup> The words of the statute, applicable to these cases are, " that the justice shall then, or at such other reasonable time as he may appoint, not exceeding six days thereafter, proceed to hear and examine, &c." In computing this time, within the rule, ante, 143, the *day* of adjourning is to be *included*, the computation being from an *act* done, to wit, the appearance or non-appearance of the defendant ; and where the process is returnable on *Friday*, the justice would

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<sup>(x)</sup> Vide 1 N. R. L. 388, s. 2. 1  
John. cas. 243.

have no power to adjourn beyond the next *Wednesday*. If the defendant do not appear, the justice has no right to wait two hours after the time of appearance, appointed in the summons, and then to appear himself at the place appointed, and adjourn the cause.(y) Where both parties appear, it is the usual practice, I believe, to grant one adjournment of course, on the application of either party, to some time within the limits of the six days. This, however, is a matter of discretion, and may be refused to either party, unless reasonable cause be shown. But the discretion to be exercised, is a legal, and not an arbitrary one; for, if a reasonable cause be shown, the justice is bound to adjourn, and where the defendant's child was dangerously sick, for which reason an adjournment was applied for, but refused, the judgment was reversed.(z) An adjournment cannot be granted on the plaintiff's request, for more than six days, without the consent of parties;(a) and this cannot be granted at any other time, except on the return of the process.(9 John. 136. 7 id. 530.) Nor can the justice adjourn the cause on his own motion, or on the plaintiff's request, more than once.(b) The six days adjournment must be the next six days immediately after the return of the summons;(c) and the only authority for a justice to adjourn on the return of a summons, is contained in the second section of the 25 dollar act.(d) The return day of the summons is the only time at which he can adjourn, on his own motion;(e) but he may then adjourn of course, without requiring proof of the absence of a material witness.(f) The rule as to adjourning on the return of an attachment, is the same as in case of a summons.(g)

N. B. In adjourning a cause, the justice must, in all cases, be present in proper person, and can never do this by sending a note in writing to the parties of the time and place to which he has adjourned.(h)

2. Upon the return of a warrant, the adjournment is, in general, to be for not less than three, nor more than twelve days, on the request of either party,(i) to be computed from the *act* of return, the first day inclusive. (Aute, 145.) Where a warrant, therefore, is returned the first day of September, the adjournment cannot go beyond the twelfth, nor short of the

(y) 11 John. 407.

(z) 8 id. 426.

(a) 7 id. 381. 2 id. 192. 7 id. 381. 1 John. cas. 101. 2 Caines, 171.

(b) 2 John. 192.

(c) 7 id. 381.

(d) id.

(e) 7 id. 529.

(f) 9 John. 354.

(g) 1 N. R. L. 399, s. 25.

(h) 4 John. 117.

(i) 1 N. R. L. 389, s. 4.

third day of the same month, without consent, though where the party applying, did not require three days, and the justice adjourned the cause over to the next day only, it was holden well. (9 John. 366.) This adjournment the justice is bound to grant of course, without any cause shown, provided security be given as required by the act, whichever party applies (j)

An exception to the above is, in the case of non-resident, who sues as such, by giving security, and making the requisite proof of non-residence. In such case, the justice is bound, unless the parties otherwise agree, to try the cause within three days after the defendant is brought before him, on the warrant, the time to be computed as last mentioned. (k) The justice, doubtless, has a discretion within the three days, and though not bound to adjourn of course, as in other cases on the return of a warrant, should he refuse an adjournment for reasonable cause, it would be error, as in the case of a return of a summons in 8 John. 426.

3. In the cases not provided for in the fourth section of the act, which is confined to the adjournments upon the return of a warrant, the defendant is entitled to an adjournment, for a time not exceeding three months, if he "shall make oath that he cannot, for want of some material testimony or witness, safely proceed to trial;" (l) and give such security as we shall hereafter notice. This time must be computed by lunar months of twenty eight days each. (m) So that the justice cannot adjourn from the first September to the last of November, which would be three calendar months, but he would be confined to the 23d of November, being three lunar months, thereby including the first day, the act of adjourning, (ante, 143,) within the computation. Within this time, the magistrate has a discretion to be guided by the circumstances of each case, such as the distance of the witness, &c. The most of the cases in which this application upon oath may be made, are as follows: 1. Where the parties join issue without process. 2. On the return of a summons or attachment. 3. Where one or more adjournments have been had *without oath*, in any case, (excepting that of a non-resident plaintiff *suing as such*.) whether the adjournment, or adjournments were in a cause commenced by *summons, attachment, warrant*, (n) or otherwise, and whether the adjournment or adjournments thereupon, were by

(j) 8 John. 458. 15 John. 469.

(k) 1 N. R. L. 389, s. 4. 2  
Caines, 245.

(l) 1 N. R. L. 389, s. 5.

(m) Ante, 144.

(n) Vide 2 John. 383.

consent of parties or otherwise, without oath. In all these cases the justice is bound, on the defendant's showing proper cause, on oath, to adjourn for a term not exceeding three lunar months.

If this application on oath be made in the first instance, on the return of a summons or attachment, or on joining issue voluntarily, the justice is doubtless bound to grant it, without the defendant's showing any effort to procure his testimony, for, until issue joined, neither party can legally know what will be the claim or the defence of his antagonist.(o) But this reason ceases where an issue has been joined, and there has been one adjournment, on the application of the defendant.(p) And so, if the adjournment be on the application of the plaintiff, or on the justice's own motion, it is fair to infer from the case of *Hemstrack v. Youngs*.(q) that if the defendant do not show due diligence or some excuse for not being ready, the justice may refuse a second adjournment on his application. And the reasoning of the court in *Powers* and *Lockwood*.(r) seems to apply as well to the case of an adjournment at the plaintiff's as the defendant's request, though that was a case where the defendant had applied for the first adjournment. "There must, (say the court) be some reasonable limitation to the time of the application, and of which the court is to judge. After one adjournment, at the request of the defendant, to enable him to prepare for trial, it would be vexatious to allow him another on the usual affidavit, and without showing any diligence in the mean time. The first adjournment applied for by the defendant, was for time to prepare for trial, and was a substitute for an adjournment on affidavit and security. Both the witnesses, whose names were given by the defendant, lived within four miles of the court. The defendant is always entitled, as of right, to one adjournment, to procure testimony on making the requisite oath; but if he neglect to take out *subpoenas*, or make any effort to procure his witnesses after issue joined, and after an adjournment on his own motion, he ought not, in reason and justice, to be entitled to a farther adjournment, without some special cause shown for the non-attendance of his witnesses, or for the adjournment. On the adjourned day after issue joined, the plaintiff is supposed to appear with his proof, and the jury to appear upon the *venire*; (in that case a *venire* was issued) and it would be an abuse for a defendant to be entitled, as of course, to another adjournment to procure his

(o) And vide 9 John. 364. id. 133, 4.

(p) 9 John. 133. 12 id. 418.

(q) 9 id. 364.

(r) id. 133.



testimony, without having taken any one step towards it, in the mean time, or shown any one reason why he has omitted to do it. The statute could not have intended to help a party in his wilful negligence." On the other hand, where the defendant shows that he has subpoenaed a material witness, who does not attend, and that without such testimony he cannot safely proceed to trial, or any other reasonable excuse, for not being ready, the justice is bound to grant the adjournment, and if refused, it is an error for which the judgment will be reversed.<sup>(s)</sup> Indeed, in *Beekman v. Wright*.<sup>(t)</sup> the report says, that the cause had been adjourned, on the defendant's application, from the 30th March, to the 2d of May, upwards of a month, "on giving security, &c." by which I understand an oath also, (and which no doubt must have been made in that case, from the length of time for which the adjournment was granted) the court say, "the justice should have granted a further adjournment, on the defendant's making oath that he had subpoenaed his witness, who was material and did not attend;" and because a second adjournment was refused, the judgment was for this, among other reasons, reversed. It appears from this case, that a justice may adjourn from time to time, and more than once on the defendant's making the proper oath and giving security, confining himself, however, within the boundaries of the three months, which his adjournments in the aggregate cannot exceed. (3 John. 425, 6.) The justice has no right to refuse the adjournment, in these or any other cases, where it is matter of right, because the party applying, refuses to pay the costs of a venire, or other costs in the cause.<sup>(u)</sup>—And whether a justice's court has in any case, a right to impose the condition of paying costs, where the adjournment is matter of discretion, and granted as a favour? Quere.<sup>(v)</sup>—Nor is it a reason for not adjourning on good cause shown, that the parties had themselves agreed on and fixed the day of trial.<sup>(w)</sup> But where the defendant applied to adjourn, and stated what he wished to prove by his absent witness, which the plaintiff agreed to admit, and the defendant, at first acceded to this proposition, and said he would go to trial, but afterwards insisted on a further admission, which the justice thought unreasonable, and refused the adjournment, this was holden right, and the court remark, generally, in giving their opinion on this case, that "if the plaintiff will admit the testimony, no time can be wanted to procure witnesses."<sup>(x)</sup> In like manner, where

(s) 11 id. 442. 9 id. 364. 13 id. 462.

(t) 11 id. 442.

(u) 9 id. 364. 11 id. 442.

(v) 11 id. 442.

(w) 13 id. 462.

(x) 14 id. 341.

the defendant refuses to name his witness, or to state where he resides, the adjournment may be denied.(y) But the witness residing out of the jurisdiction of the court, can form no ground to refuse the adjournment; for the defendant must take his chance of procuring his attendance in season.(z)—These various questions concerning the right to adjourn, arise almost exclusively on the application of defendants. The plaintiff's right of adjournment, indeed, the only authority to adjourn except at the instance of the defendant, is confined to the second and fourth sections of the act;(a) by the former of which it will be seen that he is restricted to six days,(b) and by the latter, to three days in one instance, and to twelve in another. And so strictly is this rule adhered to, that, in one case, where the plaintiff, after one adjournment by consent, stated to the justice, that the defendant had agreed to adjourn, and then made oath of the absence of a material witness on his own part, the defendant not appearing, this was holden irregular, and the judgment reversed.(c) A still stronger case was, where the parties adjourned by consent, and both appeared at the adjourned day, and the plaintiff showed cause on oath, that he had a material witness absent, whom he had been unable to procure, but without whose testimony he could not safely proceed to trial; in this case, though perfect justice was done, in giving judgment for no more than the defendant admitted to be due, yet, because the justice granted the adjournment, the judgment was reversed.(d)

It is said in one case, that the defendant's agent or attorney may make the requisite oath for an adjournment, unless some special cause be shown against it.(e) But in a subsequent case it is decided, that this rests in the sound discretion of the justice; and that unless it appear that the defendant cannot attend, the oath of the attorney or a third person may be refused.(f) A party has no right to apply for an adjournment after the jury are sworn;(g) nor after a trial has begun before the justice.(h) But the justice may in these cases, hold his court open for a short time, (and in one case it was holden that two hours was not unreasonable) to enable a party to procure a material witness: and this was holden right, even after a jury had been impannelled and ballotted. It was farther said by the court, that this matter rested in the sound discretion of the justice, and unless he had abused his discretion, it was no reason for revers-

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(y) 15 id. 43.

(z) 2 id. 383.

(a) 1 N. R. L. 388, 9.

(b) 7 John. 382, per Cur.

(c) 8 John. 391.

(d) 15 John. 492.

(e) 1 id. 514.

(f) 13 id. 228.

(g) 8 id. 437.

(h) Griffith's Treatise, 80.

ing the judgment ;(i) but 20 hours, to enable the defendant to obtain a witness 12 miles off, was holden unreasonable, and the judgment reversed.(13 John. 469.) And a justice may even keep his court open till the next day, where a delay in summoning a jury or other exigency, renders this necessary ;(j) and so the trial of a cause may be postponed, on account of the justice being engaged in the trial of other causes, and indeed, in any case where such delay is reasonably accounted for.(k)

But, in general, where a time of appearance is appointed by the justice, either in the summons, &c. or by adjournment, the party is bound to wait only a reasonable time ;(l) and in one case, where the justice being absent, the party waited nearly 3 hours after the time, and then went away, it was holden too late to proceed.(m) But in another case, where the defendant appeared at the time, and waited till the justice came, which was about an hour, and then urged the justice to call the cause, who refused to do so, and waited about 20 minutes, till the plaintiff came, and then told the defendant he should proceed, which he did do, this was holden well.(n) And an hour or more, is not an unreasonable delay, even where the party appears at the time and urges the calling of the suit.(o) And where the party consents, that the justice may absent himself on business, this takes away all error, as to the party consenting.(p) In another case, a delay after the return of a summons for more than two hours, within which time the defendant appeared, but departed before the justice arrived, was holden a discontinuance of the suit.(q) —

FORM OF THE OATH, *on application to adjourn under the 5th section.*

You shall true answers make, to such questions as shall be put to you, touching your application to adjourn this cause. So help you God.(r)

(i) 8 John. 409.

(j) 2 Caines, 134.

(k) 12 John. 217.

(l) 5 id. 353.

(m) id.

(n) 15 id. 486.

(o) 11 id. 459.

(p) 15 id. 504.

(q) 11 id. 407.

(r) Vide ante, 256.

## SECTION II.

## OF THE TERMS ON WHICH AN ADJOURNMENT MAY BE GRANTED.

We have already noticed when an oath is necessary, in order to an adjournment, what must be stated under that oath, and by whom, with the form of the oath, and whether a justice may impose the terms of paying costs in any case.

1. Another condition of adjourning, in all cases is, that "the party requesting an adjournment," *whether plaintiff or defendant*, (after having seen the account or demand of the adverse party,) "shall, if required, exhibit his or her account or demand, or state the nature thereof, as far forth as may be in his or her power, to the satisfaction of the justice, before whom the cause is to be tried." (1 N. R. L. 389, s. 5.) The party wishing to adjourn, ought to come prepared to do this, from books of account, contracts in writing, or other means, in his power; and the justice ought not (if more be required by the opposite party) to be satisfied with a mere colourable or general statement; for each party is entitled to a statement as particular as possible, in order that he may know what he is to meet. Any thing more particular than the declaration or pleas, will not, however, be necessary, in order to an adjournment, except where the plaintiff has a right to declare, or the defendant to give notice of, or plead a set off, in such general terms as to import no definite or specific claim or demand. An example of these will be found in the various forms I have given of common declarations, or counts in *assumpsit*, (s) and a notice of set off, which may be as general and indefinite on the part of the defendant, as the common counts of the plaintiff. (t) Indeed, the common law courts, have, in these cases, uniformly required at the instance of the party against whom these claims have been exhibited in this general form, a bill of the particulars, which it is intended by the party who thus declares, or gives notice, to be proved, or insisted upon at the trial. (u) In a justice's court, it is not always in the power of the party, at the time of joining issue, to make out a regular bill of particulars, or he may have come unprepared to do this. If insisted on, however, the justice may exact it, and if the party, or his attorney, cannot, at the moment, comply, through a want of knowing that it was necessary, forgetfulness, or other reasonable cause, he should be

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(s) Vide ante, 369 to 373.

(t) Ante, 463.

(u) Vide Tidd, 534. 5, 6, 7, 8,

5 Taunt. 223. Ante, 369.



ready to satisfy the justice on his oath, that he has some such excuse, (after exhibiting such a statement of particulars as shall be in his power) with which the justice ought, doubtless, to be satisfied.

*The oath may be as follows :*

You shall true answers make to such questions as I shall put to you, touching the excuse you have to offer, for not making a more particular exhibition of your account or demand in this cause. So help you God.(v)

A statement, by way of declaration,(w) or set off,(x) in many of the forms which I have given, though they are valid in law as declarations or notices, yet they are so general and vague, as not to apprise the party, against whom they are introduced, of the particular matters intended to be proved. And there can be no doubt, that a power so usual in courts of record, as that of compelling the party to complete his declaration or notice by a bill of particulars, is incident to a justice's court.(y) When exhibited, this bill is an amplification, and makes a part of the declaration, or of the plea or notice of set off; and the party is not allowed at the trial to give evidence of any items not contained in the bill.(z) The justice ought to order this bill, if not exhibited at the time of joining issue, (provided the party require it) to be brought and filed with him at a certain day, or delivered to the party requiring it, in order that he may know what he has to meet. Otherwise he might be surprised on the trial by a bill of exchange or promissory note, for instance, with indorsements and protests, when the declaration or notice of set off imports nothing more than a charge for money lent, &c. (a) or with particulars of which he or his witnesses might know nothing, under other general counts. Should the plaintiff refuse or neglect to comply with this order, he may be non-prossed,(b) the effect of which, is the same as a non-suit, or, if the defendant disobey the order, his plea or notice of set off may be overruled as insufficient.

In this bill, the party is not bound to state the credits or payments given to, or made by the other side, but only the charges on the debtor side.(c) It could be required in a justice's court, only in the above general form of declaring in assumpsit or debt, and is not, in general, applicable to actions for wrongs.

(v) Vide ante, 256.

(w) Ante, 369 to 373.

(x) Ante, 463.

(y) I v. R. L, 387, s. 1. 2 John.

386, per Cur.

(z) Tidd, 537, 8. 15 John. 222.

(a) Vide ante, 368.

(b) 14 John. 329.

(c) 15 id. 222.

(d) It is, of course, not necessary where the declaration or notice sets forth the matter particularly, as on special contracts, covenants, &c. (e)

2. Another condition is that of giving security. It would probably be deemed no abuse of the justice's authority, should he exact security of the party wishing to adjourn, in all cases, whether on the return of a summons or warrant, excepting the case of a plaintiff suing as a non-resident, who has already given security. But in practice, it is usual on the return of a summons or attachment, to suffer either party to adjourn without security ; and whether it shall be required or not in these cases, must be a matter of mere discretion, to be exercised according to the circumstances of each particular case.

Where security is required by the statute, as a condition of adjourning, it should be either a recognizance taken before the justice, or, at least, a written engagement ; for if it be merely by parol, it is within the statute of frauds, and void, as being an engagement to answer for the default or debt of a third person.

(f) That this recognizance may be taken by parol, and drawn up by the justice at any time, vide ante, 258, 9. *1 Chitty's Cr. L. 90*, and the authorities there cited. The written engagement ought to be executed in the justice's presence ; for its due execution ought to be known to him, though if properly executed elsewhere, it would be sufficient. The better way, perhaps, in all cases is, to draw up a written engagement in the terms of the statute, and require the surety to sign it. The justice has a right either to exact security or not as he pleases, of a defendant who is sued by non-resident as such, and who wishes to adjourn ; but in all other cases, on the return of a warrant, on either party applying to adjourn, he must give security, unless this be waived by the opposite party ; (g) and so in all cases where the defendant adjourns on oath.

(h) The form of the security varies according to the party applying, and the nature of the application. If the plaintiff adjourn on the return of a warrant, it is—"That he shall appear and stand trial" on the day appointed :—If the defendant,—

"That he shall appear" at the day appointed, "and in default of such appearance, shall pay the debt, or damages and costs, in case judgment be against him."—If the application be by the defendant on oath, within the fifth section of the act, the secu-

(d) *Tidd*, 534 to 538.

(e) *id.* 534.

(f) *Vide ante*, 142 to 153. *7 John. 18, 19.*

(g) *1 N. R. L. 382, s. 4.*

(h) *id.* s. 5.

rity is, "That the defendant shall appear" at the adjourned day, "and answer the action, and pay the judgment, or render himself in execution." In cases where the justice has a discretion, the adjournment being matter of favour, the justice may, of course, require as a condition of that favour, security in any of the above forms, or even security for the payment of judgment absolutely, but as the statute gives him no power about security in such cases, it should be in writing at least, and had better be sealed by the surety.(i)

If the surety offered, pass without objection from the opposite party, he is received of course. If objected to, the justice may, doubtless, as he has a right to do in criminal cases,(j) and as is done on exception to bail in courts of record, ascertain his competency on oath, or require an affidavit touching the value of his estate, &c. In a court of record, the plaintiff is entitled to two sureties, house keepers of the county, who will swear that they are each worth double the sum claimed by the writ, beyond what will pay their debts respectively.(k) In analogy to the rules of these courts, it would be well for the justice to regulate his discretion upon the same basis, by requiring of the defendant two sureties, each worth double the sum, or one surety worth four times the sum contained in the process, and the same amount of bail, of the plaintiff, where a set off is admissible.—But in other actions, not admitting a set off, five dollars is ordinarily all the defendant can recover.(l) The statute not prescribing any particular form of these securities, a deposit of money, or bank bills, would be sufficient. The amount to be determined upon the principles mentioned, ante, 258.(Vide also 13 John. 481.) The bail may be opposed, on the ground that he is embarrassed in his circumstances; or about to leave the county; or that he had been bail before, without knowing in how many actions, or for what sums; or on other grounds calculated to excite suspicion, that he might be unable to meet the demand.(m) To ascertain these facts, the bail, after swearing to a round sum, sufficient in the first instance to establish their competency, may be cross-examined on an oath, (the form of which I shall give) by the party or counsel opposed to his principal. The justification may be by the following affidavit:

(i) Vide Ante, 300.

(j) Vide 1 Chitty's Cr. Law & cases there cited. p. 99.

(k) Vide Tidd, 228, 9. id. 226.

Soleman, 44. 3 John. 358.

(l) Ante, 258.

(m) Tidd, 229, 30.

## FORM OF AN AFFIDAVIT OF JUSTIFICATION OF BAIL.

Richard Roe, } Before Philip Green, Esq. one of the just-  
 ads. } ces of the peace, of the county of Sar-  
 James Jackson. } atoga.

SARATOGA COUNTY, ss.

John Doe maketh oath and saith, that he is a house keeper, (or freeholder) now actually resident in the town of Saratoga Springs, in the said county; and that he is worth \$200, over and above what will pay all his debts.

John Doe.

Sworn the 1st day of September, 1820, before me,

Philip Green, justice.

If the party interested wish to interrogate the bail farther, he may be sworn as follows:

## FORM OF THE OATH.

You shall true answers make to such questions as shall be put to you, touching your competency as security for Richard Roe, on his application to adjourn this cause. So help you God.

The entire justification may be taken on the above oath, without the affidavit, if thought best; but as the magistrate would be amenable for gross neglect in this matter; and as the examination on oath would, doubtless, exculpate him on a charge of this kind, it might be better, sometimes, to preserve the justification in the shape of an affidavit, for the greater ease of proof.

FORM OF THE SECURITY—on adjournment at defendant's request upon return of warrant.

Richard Roe, }  
 ads. }  
 James Jackson. }

SARATOGA COUNTY, ss.

At a court before Philip Green, Esq. one of the justice, of the peace of the said county, at his office in the town of Saratoga Springs, this cause being on the application and at the request of the above named defendant, on the return of the warrant therein, adjourned to the 10th day of September instant, at 1 o'clock P. M. at the said office; Now, therefore, in consideration of the premises, and for value received, I do hereby agree, with the above named plaintiff, that the said defendant



shall appear at the above time and place of adjournment, and that in default of such appearance, he shall pay the debt, or damages and costs to be recovered against him in this action, if judgment shall be given against him therein. Dated the 1st day of September, 1820.

John Doe.

FORM—where plaintiff adjourns on a warrant.

James Jackson,

v.

Richard Roe.

SARATOGA COUNTY, ss.

At a court, &c. (as in the last.) This cause being, on the application, and at the request of the plaintiff, on the return, &c. (as in the last.) Now, therefore, in consideration, &c. (as in the last.) I do, hereby, agree with the above named defendant, that the above named plaintiff, shall appear and stand trial in this cause, at the said time and place of adjournment. Dated, &c.

John Doe.

FORM—where defendant adjourns on oath.

Richard Roe,

ads.

James Jackson.

SARATOGA COUNTY, ss.

At a court, &c. the trial of this cause being, on the application, at the request, and on the oath of the above named defendant, that he cannot for want of a material witness, safely proceed to trial therein, postponed to, &c. at, &c. Now, therefore, in consideration of the premises, and for value received, I do hereby agree with the above named plaintiff, that the above named defendant shall appear at the time and place aforesaid, and answer the action of the plaintiff in this cause; and further, that he shall pay the damages and costs, (or debt and costs, if the action be debt,) or render himself in execution therefor, in case judgment shall be given against him. Dated, &c.

John Doe.

In drawing these agreements, the cause should be entitled according to the character in which the parties sue or are sued; (vide ante. 249, 50;) and may be easily varied to meet all cases of adjournment; as on return of summons, attachment, &c.

The justice is not required, by the statute, to take security of the defendant on an adjournment, even on a warrant, at the suit of a non-resident plaintiff.<sup>(n)</sup> But in other cases, where the

<sup>(n)</sup> 7 John. 383, per Cur.

defendant adjourns upon the return of a warrant, he must not only give security to appear, &c but such appearance, in order to satisfy the terms of the security, must be a personal one, and not by attorney.(o) And so must the appearance of the plaintiff be personal, where he gives security in the like case; for the Supreme Court remark, generally, in *Dunham v. Heyden*, (p) that "the appearance mentioned in this section," evidently meaning the 4th section, (vide 1 N. R. L. 388, 9,) "must mean a personal appearance." That section mentions security for the appearance both of plaintiff and defendant.

### SECTION III.

#### WHEN AN ADJOURNMENT AMOUNTS TO A DISCONTINUANCE OF THE SUIT.

An adjournment improperly made, is a discontinuance of the suit.(q) This was holden in several of the cases which I have cited, under the two previous heads of this chapter: As where the justice sent a note in writing, to adjourn the cause,(r) or adjourned on the plaintiff's oath of the absence of a material witness, accompanied with his statement, that the defendant had agreed to the adjournment;(s) so where the court was holden open 20 hours, for the defendant to obtain his witness;(t) and where the party waited nearly 3 hours after the time appointed, and then went home, after which the justice came and rendered judgment;(u) and so of the like cases. But where the justice has a discretion in adjourning a cause, nothing but an abuse of his discretion will be regarded as error.(v) In general, if the party who objects to an adjournment, appear and go to trial, it is a waiver of the irregularity; and he cannot take advantage of it on certiorari;(w) though it is otherwise where an adjournment is refused.(x) Nor can the party who obtains an irregular adjournment, object that it is error;(y) and if one party request, or consent to an adjournment, and the other make no objection, the adjournment will be deemed by consent of parties.(z) And where, after an improper adjournment, the defendant confesses judgment, this is a waiver of the irregularity.(a)

(o) id.

(p) id.

(q) 2 John. 192.

(r) 4 id. 117.

(s) 8 id. 391.

(t) 13 id. 469.

(u) 5 id. 353.

(v) 8 id. 391.

(w) 7 id. 381. 9 id. 136.

(x) 7 John. 382, per Cur.

(y) 3 Caines, 166.

(z) 7 John. 529.

(a) 11 id. 461.

## CHAPTER VIII.

### OF TRIAL, AND ITS INCIDENTS.

#### SECTION I.

##### OF PREPARATION FOR TRIAL.

1. To compel the attendance of witnesses, and the production of the necessary papers in their hands, the party may obtain, either from the justice who tries the cause, or from any other justice, (b) a subpoena to testify, or to produce the paper as evidence in the cause, or both. (c)

##### FORM OF SUBPCENA TO TESTIFY.

SARATOGA COUNTY, ss.

*Philip Green*, Esq. one of the justices of the peace of the county aforesaid, to *John Doe*, *Thomas Noakes*, &c. GREETING : You, and each of you, are hereby commanded, in the name of the people of the state of New-York, personally to appear before the said justice, at his dwelling house in the town of Saratoga Springs, in the said county, on the 10th day of September instant, at one o'clock P. M. to give evidence in a cause now depending, before the said justice, and then and there to be tried, between *James Jackson*, plaintiff, and *Richard Roe*, defendant, (1) on the part of the plaintiff, in a plea of trespass on the case. (d) Hereof fail not at your peril. Given under my hand, at the said town of Saratoga Springs, the 1st day of September, 1820.

*Philip Green*, justice.

*If returnable before another justice, say,*

Before *James Denn*, Esq. one of the justices as aforesaid, at his office, &c.

The above is called a subpoena *ad testificandum*. If either of the witnesses are required to produce some paper, or other ev-

(b) 1 N. R. L. 400, s. 29.

(c) Vide Phil. Ev. 14.

(1) Preserve the characters of the parties as ante, 249, 50.

(d) Vide ante, 251.

idence in his possession, add a clause as follows : It is then called, in respect of this clase, a *subpœna duces tecum* :

And you, the said John Doe, are further commanded to bring with you, and then and there produce in evidence, a certain agreement in writing, (or *promissory note*, &c. according to the case,) lately left in your hands by the said parties, and all deeds, evidences and writings, which you have in your custody or power, concerning the premises.

This clause is inserted immediately after the words *trespass on the case*, or other words stating the plea, in which the witness is subpœnaed to testify. Each subpœna should contain the names of four witnesses only.(e)

2. The service of a subpœna should be by showing the same to the witness,(f) and delivering him a ticket containing the substance of the subpœna.(g) or a copy of the subpœna ;(h) and where a copy of the subpœna was delivered, containing the name of the witness, but the attorney, by mistake, omitted to insert it in the original subpœna, which was shown to the witness, Gibbs; C. J. suffered the name to be inserted in court, on the return thereof, at the time when the witness was called, and ordered a default entered thereon.(i) This service must be personal, on the witness, and in reasonable time before the hour of trial, that he may suffer the less inconvenience from his attendance on the court.(j) And it has been holden that notice to a witness in London, at 2 P. M. requiring him to attend the sittings at Westminster, (in the same city) in the course of the same evening, is too short.(k) If the witness be a married woman, still the subpœna must be served upon her personally, and a tender of witness' fees made to her, and not to her husband.(l)

No witness is bound to appear except his regular fees be tendered to him, at the time of serving the subpœna, nor if he appears is he bound to give evidence, till such fees are actually paid or tendered.(m) The amount of such fees to a witness within the county, is 12 1-2 cents, and to a foreign witness 25 cents per day,(n) which I imagine should be computed as in

(e) Cowp. 845, 6.

(f) Cro. Car. 522, 540. 5 Mod. 355.

(g) id.

(h) 1 Holt's N. P. Rep. 526.

(i) id.

(j) 1 Str. 509. Penn. on small causes, 143.

(k) 2 Tidd's pr. 807, 5th ed.

(l) Cro. Eliz. 122. 1 Jon. 430, 57 P.

(m) 2 Str. 1159. 13 East, 16, n. a. S. C. 1 Blac. Rep. 36. 1 H. Blac. 49. 13 East, 15. 1 Merivale 131.

(n) 1 N. R. L. 399, s. 26.



courts of record, including one day's attendance, and estimating each day's travelling to, and returning from court, at 30 miles. (o) But where one party has subpoenaed a witness, and paid him his fees, the opposite party, on subpoenaing the same witness, is excused from making him any tender; and it has been determined in one case, that if such tender be made and the witness receive the money, concealing the previous payment from the party, it may be recovered back, in an action for money had and received, on the ground of the fraudulent concealment. (p)

I have preferred considering this tender necessary, upon the reasoning of the courts in the cases I have cited at the last note, (m) which appears to put this doctrine of previous tender to a witness upon common law grounds, though Mr. Philips thinks it arises out of the express provisions of the statute of Eliz. (q) of which our statute in regard to subpoenaing witnesses in courts of record, before cited in last note, (o) is a substantial transcript. I admit the application of this doctrine to a justice's court to be doubtful; for the allowance of fees to witnesses, in that court, seems, by the express provision of the statute, (1 N. R. L. 399, s. 26,) to depend upon the witness' being sworn, the expression being, "*every foreign witness, &c. attending and sworn.*" which seems to make the actually being improved as a witness, a condition precedent to the fees being due. It is advisable, however, if the witness be important, and unwilling, to remove all doubt by making the tender. How a tender is made, and when waived by the conduct of the party, vide ante, 477 to 483.

It is decided in 1 Bl. Rep. 36, 7, and vide 13 East, 15 to 17, that a person is not compellable to be examined as a witness, until duly subpoenaed, though he stand by in court during the trial. Such is doubtless the law; for until regularly subpoenaed, he is a mere stander-by. (id. and vide Cowp. 845, 6.) A justice's subpoena runs not only through the county where the cause is triable, but also through the adjoining county. (r)

3. But though a witness attend and be sworn, without a subpoena, he is entitled to his fees, (s) and may accordingly bring his action for them, and maintain it by giving parol evidence of being sworn on the call of the party, without producing the record or minutes of the court to prove this fact. (t) Within the

(o) Vide id. 524. 2 id. 29.

(p) 1 B. Moore's Rep. 76.

(q) Phil. Ev. 2, 3.

(r) 1 N. R. L. 392, 3, s. 10.

(s) 1 Binney, 46.

(t) 15 John. 260.

same principle, it would doubtless be unnecessary to prove the existence or service of a *subpœna*, though this was done in the last cited case. In this action for witnesses' fees, however, no other or greater fees than are allowed by the statute, can be recovered, even though the witness be a foreign one. <sup>(u)</sup>

4. Of the witness' privilege from arrest while attending, &c. vide ante, 278. He enjoys this privilege, whether he be subpœnaed or not, if he attend in good faith at the request of the party; <sup>(v)</sup> though this has been holden otherwise in Massachusetts. <sup>(w)</sup> The courts allow a liberal time for the witness to return, before he is liable to arrest. <sup>(x)</sup> He is protected at his lodgings. (4 Dall. 387.) But his character of witness will not exempt him from the service of a summons, unless in presence of the court. (1 Peters' Rep. 41, but vide Southard's N. J. Rep. 366, contra.) Nor will the witness be protected while about his ordinary private business, after he is discharged from the obligation of his subpœna. (4 Dall. 329.)

It is proper to notice more at large, before I pass to the next section, that in making service of a subpœna, a ticket, made out by the party, or any person in his behalf and delivered to the witness, explaining the contents of the subpœna, will, in all cases, answer the same purpose as a copy; though by using the latter, a greater uniformity may be preserved in the blanks kept by the magistrate for use.

#### *Form of a ticket.*

To Mr. John Doe,

By virtue of a subpœna herewith shown to you, you are personally to appear before Philip Green, Esq. one of the justices of the peace of the county of Saratoga, at his office in the town of Saratoga Springs, in the said county, on the 10th day of September, instant, at one P. M. to give evidence in a cause now depending before the said justice, and then and there to be tried, between James Jackson, plaintiff, and Richard Roe, defendant, on the part of the plaintiff, in a plea of trespass on the case. (here insert the *duces tecum* clause, if any.) Dated Sept. 1, 1820.

By Philip Green, justice.

(u) 14 id. 257.

(v) 8 T. R. 536. 2 John. 294.

(w) 6 Mass. Rep. 264.

(x) 2 Bl. Rep. 1113. 2 Str. 936.  
13 East, 16, n. a.

I am aware, that in requiring the above formality in the service of a subpoena, the general practice is against me. The service is generally made by reading the subpoena, or explaining the contents in the hearing of the witness, without even showing him the signature of the magistrate. This is wrong. It is not a good service. It is true that a formal service may be waived, by the witness' expressly accepting such imperfect service of a subpoena, or perhaps by contemptuously and unqualifiedly refusing to attend, without objecting to the *manner* of service ;(y) but unless this is the case, the forms which I have recommended are doubtless necessary. The error of practice in merely reading, or explaining the subpoena by parol, has probably arisen from considering it as analagous to a summons, or other precept directed to an officer bound to do service ; but such analogy will not hold. No officer is bound, or entrusted, or singled out by the law to serve this process. It is directed to the witness, and any person indiscriminately may serve it. Disobeying it, brings the party into contempt of the court, and subjects him to a fine and damages.(z) It is, therefore, more analagous to a judge's order, or a bill of costs due by a rule of court, in both which cases, not only the original order, rule and bill must be shown personally to the party, under the hand of the clerk or taxing officer, but a copy thereof at the same time delivered, before the party will be deemed in contempt for disobedience of the order, or non-payment of costs.(a) Besides, the mode of service which I have pointed out, is uniformly practised in courts of record.(b) and is adopted in the justice's courts of New-Jersey,(c) the construction whereof very nearly resembles our own. The party himself may make the copy or ticket, and the actual signature of the justice is not necessary to any but the original.(d)

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## SECTION II.

### OF PROCEEDING AGAINST THE WITNESS, FOR DEFAULT OF APPEARANCE, &c.

The penalty, for default of appearance, and the mode of proceeding for its collection, are pointed out in the 10th section of

(y) 2 John. cas. 109.

(z) 1 N. R. L. 392, s. 10. 10 John. 148.

(a) 3 John. 440. id. 29.

(b) Vide Cro. Car. 522. id. 540.

5 Mod. 355.

(c) Griffeth's Treatise, 86. Penn. on small causes, 242.

(d) Penn. on small causes, 142.

the 25 dollar act.(e) By this section, if the person subpoenaed as a witness, shall not appear, or appearing shall refuse to give evidence, he forfeits to the overseers of the poor of the town where the fine is levied, not exceeding 10 dollars, nor less than 62 cents, *unless some reasonable cause be proved on oath to the satisfaction of the court.* As proof, in law, means legal proof, it follows, that this excuse must be established by evidence, other than the defaulting witness' own oath ;(f) and the witness is not only fineable for his default, but is, moreover, liable to an action at the suit of the party aggrieved by the want of his evidence, in which he may recover such damages as he can show that he has sustained thereby.(g) Before the fine can be imposed, the defaulting witness must, by the 10th section just cited, be summoned to show cause, &c.

*Form of summons to a witness, to show cause against a fine.*

SARATOGA COUNTY, ss.

Philip Green, Esq. one of the justices of the peace of the said county, to John Doe, GREETING : You are hereby summoned, in the name of the people of the state of New-York, (or of the overseers of the poor of the town of Saratoga Springs, in the said county) to appear before the said justice, at his office in the town of Saratoga Springs, in the said county, on the 15th day of September instant, at 10 o'clock P. M. to show cause, (if any you have) against the imposition of a fine upon you, for not attending as a witness (or refusing to be sworn as a witness, as the case is) in a certain cause lately depending before E F, Esq. one of the justices of the peace of the said county, (or before me the said P G, if the subpoena were issued by the same justice who proceeds for the fine,) on the 10th day of September instant, at his (or my) office, in the said town of Saratoga Springs, between James Jackson, plaintiff, and Richard Roe, defendant, of a plea of trespass on the case, you having been duly subpoenaed, (as is alleged) to attend and give evidence in the said cause, at the time and place last aforesaid. Dated the 10th day of September, A. D. 1820.

Philip Green, justice.

This summons should be served by showing the original to the witness implicated, and, at the same time, delivering to him a true copy thereof, as we have just noticed of the service of a subpoena ;(h) a reasonable time before the return day ; and an

(e) 1 N. R. L. 392.

(f) Vide ante, 262, 264, & cases there cited to this point.

(g) 10 John. 248.

(h) Ante, 520, 21. 7 John. 96.



affidavit of service must be indorsed, which will be absolutely necessary, (unless the witness appear at the return day) in order to warrant any further proceeding.

*Form of the affidavit of service of summons.*

SARATOGA COUNTY, ss.

*Ira Fenn* maketh oath and saith, that he did, on the 11th instant, at the town of Malta, in the said county, serve the within summons on *John Doe*, therein named, by delivering him personally, a true copy thereof, at the same time showing him the original.

*Ira Fenn.*

Sworn the 12th Sept. 1820, before  
me, *Philip Green*, justice.

In addition to this, unless the witness appear, and admit due service of the subpœna, &c. at the return of the above summons, a similar affidavit must be made of the service of the subpœna, and the witness' non-attendance thereupon.

*Form of affidavit of service of subpœna, &c.*

SARATOGA COUNTY, ss.

*Ira Fenn* maketh oath and saith, that he did, on the 6th day of September instant, at the town of Malta, in the said county, serve the annexed subpœna on the within named *John Doe*, by delivering to him personally a true copy thereof, (or a ticket explaining the contents thereof,) at the same time showing him the original subpœna hereunto annexed, and tendering him twelve cents and an half cent. And this deponent further saith, that he was present at the place mentioned in the said subpœna, for the said *John Doe* to appear, and heard his name called by the justice therein named, (or by order of the justice therein named) on the day, and after the hour therein mentioned for the said *John Doe* to appear, and that the said *John Doe* did not appear, when called as aforesaid.

*Ira Fenn,*

Sworn the 15th day of September,  
1820, before me,  
*Philip Green*, justice.

As to the question whether a tender is necessary, vide ante,  
518, 19.

If the person who served the subpœna was not present, and witnessing the default of the witness, when called in court on its return, this should be stated in a separate affidavit, or other-

wise proved on the oath, of some person who knows this fact ; for the justice should, in no case, act upon his own knowledge without proof, as we shall notice more at large when we come to speak of evidence (i) If the fine be for *refusing* to give evidence, the justice, of course, convicts the witness at once upon his own view, unless some reasonable cause appear against it, in which case no summons is necessary, nor indeed any thing more than proof that the subpoena has been served, which must be shewn or admitted in all cases, before a fine can be imposed, as is evident from the language of that section of the statute, concerning which we are speaking.

*Form of the conviction.*

SARATOGA COUNTY, SS.

It appearing to me, *Philip Green, Esq.* one of the justices of the peace in and for the said county, on examination of the matter, and on due proof made thereof by the oath of *Ira Fenn*, that *John Doe* was, on the 6th day of September instant, duly subpoenaed to attend as a witness before *E. F. Esq.* one of the justices of the peace of the county aforesaid, (*or before me the said justice*) on the 10th day of September inst. at one o'clock in the afternoon of that day, at the office of the said *E. F.* (*or at my office*,) in the town of *Saratoga Springs*, in the said county, to give evidence in a certain cause depending before the said *E. F.* justice as aforesaid, (*or before me the said justice*) and then and there to be tried, between *James Jackson*, plaintiff, and *Richard Roe*, defendant, in a plea of trespass on the case, the said *John Doe* being, at the time when he was so subpoenaed as aforesaid, in the county of *Saratoga*, (*or in the county of Montgomery, next adjoining the said county of Saratoga*) where the said *E. F.* (*or, I the said justice*) then resided. And it farther appearing to me, by the oath of the said *Ira Fenn*, that the said *John Doe* did not appear, according to the command of the subpoena in this behalf, at the time and place therein mentioned, and at which he was thereby commanded to appear, (*or, appearing at the time and place mentioned in the subpoena, in this behalf. at which he was thereby commanded to appear, did, on being duly called as a witness in the said cause, refuse to give evidence therein.*) and it further appearing to me, on the oath of the said *Ira Fenn*, that the said *John Doe*, was on the 12th day of September, instant, at the town of *Malta*, in the said county, personally served with a summons, by me issued for that purpose, by which he was summoned, in the name of the people of the state of New-York, (*or, the overseers of the poor of the said town of Saratoga Springs,*

*according to the fact,)* to appear before me, the said justice, at my office in the said town of Saratoga Springs, on the 15th day of September instant, at one o'clock, in the afternoon of that day, to shew cause (if any he had) against the imposition of a fine upon him, for his said non-appearance as aforesaid (or, *his refusal to give evidence as aforesaid*) at which time and place last aforesaid, he the said John Doe did not appear, but then and there made default, (or, *he the said John Doe did appear, and now here hath an opportunity of being heard, against the imposing such fine,*) and no reasonable cause for the default of the said John Doe, in not appearing according to the command of the said subpoena, (or *for refusing to give evidence as aforesaid,*) being proved on oath, or otherwise to my satisfaction; I do, therefore, adjudge, consider and determine, that the said John Doe shall pay a fine of ten dollars, for his said offence, for the use of the overseers of the poor of the said town of Saratoga Springs, and two dollars, being the costs attending the same fine, according to the statute in such case made and provided. Given under my hand, at the said town of Saratoga Springs, the 15th day of September, A. D. 1820.

*Philip Green, justice.*

If the witness be present and called upon by the justice, there is then no need of issuing the summons, and the recital of that fact in the conviction, may of course be omitted.

*Form of warrant to levy the fine.*

SARATOGA COUNTY, ss.

*Philip Green, Esq.* one of the justices of the peace of the said county: To any constable of the said county, Greeting: You are hereby commanded, in the name of the people of the state of New-York, that of the goods and chattels of *John Doe*, you levy and cause to be made ten dollars, which, by the consideration and judgment of me the said justice, was adjudged to be forfeited by the said *John Doe*, and imposed on him as a fine, for not appearing as a witness in a certain cause, (or for refusing to give evidence in a certain cause) lately depending before *E. F. Esq.* one of the justices as aforesaid, (or before me the said justice) between *James Jackson*, plaintiff, and *Richard Roe*, defendant, pursuant to the command of a subpoena, issued by the said *E. F. Esq.* one of the justices as aforesaid, (or by me the said justice) in the said cause, by virtue whereof he, the said *Richard Roe*, was duly subpoenaed as a witness in the cause aforesaid; and also two dollars for the costs attending the same fine, by me assessed in this behalf; whereof the said *John Doe* was convicted before me, at the town of Saratoga Springs, in the said county, as by the record

thereof remaining before me, will appear ; and bring the said money before me, the said justice, for the use of the overseers of the poor of the said town of Saratoga Springs ; and for want of such goods and chattels, whereof to levy the said money, you are further commanded to take, and convey the said *John Doe* to the gaol of the said county, there to remain, until he shall pay such fine, together with the costs attending the same. Hereof fail not at your peril. Given under my hand and seal, at the said town, the 15th day of September, A. D. 1820.

*Philip Green, justice.* (L. S.)

Although no mode of selling the property levied on, be pointed out by the statute, yet the officer doubtless may, instead of resorting to a private sale, advertise and sell, as we shall hereafter direct in case of a levy upon execution, and such seems to be a safe and fair mode of doing the business.

In levying or serving this warrant, either upon the property or body of the offender, (and so of all warrants from a justice, for levying a forfeiture in execution of a conviction) the officer may justify breaking open the outer door of a dwelling house to effect this purpose, if he be refused admittance on demand made. (j)

A suit will not lie against a justice for a fine imposed upon, and collected of a witness for refusing to be sworn, or for any other contempt. (k)

### SECTION III.

#### OF TRIAL BEFORE THE JUSTICE WITHOUT A JURY.

After an issue of fact joined, and before the justice proceeds to inquire into the merits of the cause, that is, before the commencement of the examination of witnesses, or the receiving of other evidence to the point in issue, if neither party calls a jury, the justice must then try the cause himself alone.

In doing this, the justice ought ever to keep in mind, that he is acting in a two fold capacity—as a judge directing and controlling the proceedings, according to the established rules of law ; and as a juror trying the facts. The first thing which

(j) 2 Hawk. c. 14.

(k) 3 Caines, 170.



it is the duty of the justice to turn his mind to, and in doing which he will find advantage, is, the issue between the litigant parties, that is, what they have affirmed on one side, and denied on the other, which we remember is the definition of an issue. (l) Persons unaccustomed to legal investigation, are very apt to drag into their altercations on trial, abundance of extraneous irrelevant matter. To keep them to the true points, requires an attentive distinguishing mind; great convenience will result from observing rules and pursuing a correct system. (m) This cannot be attained, without very considerable attention to the doctrine of pleadings and evidence, both of which heads will be found spoken to at large in the course of this work.

A justice is not, like a juror, liable to be challenged for favour, partiality, or even corruption; though he would be subject to indictment for the latter. (n) Thus, where the justice was the father-in-law of the plaintiff; (o) or where he was half uncle to the plaintiff's wife; (p) or where he had given an opinion in the cause, (q) it is no cause of challenge. But there is a gross indecency, in one's trying a cause, as justice, for a near relation, which should induce the Supreme Court, on certiorari, to scrutinize his proceedings with a jealous eye. (r) It has been determined, that a justice is not disqualified, even by an interest in the event of a cause, such as would be the ground of principal challenge to a juror; for instance, where he will be benefitted as an inhabitant of a town, by a recovery of money in a *qui tam* action for the use of the town. (s) But a justice ought never to grant process for the trial of a cause, either where he is the near relation of the party by blood or marriage, or where his opinion has been sought and obtained in relation to the matter in controversy; nor even where the party has made a statement of facts, and taken from the justice any direction whatever, concerning them, though it be merely as to a course of proceeding to obtain redress.

In this trial before a justice alone, if the party mean to submit to a non-suit, he must do so before the cause is finally submitted for advisement; or the judgement will be a bar to a new action. (t)

(l) Ante. 501.

(m) Vide Penn. on small casues, 146, 7.

(n) 12 John. 356.

(o) 13 id. 191.

(p) 17 John. 133.

(q) 12 John. 356.

(r) 13 id. 191.

(s) 11 id. 76, & vide 1 Day, 278.

S. P.

(t) 11 John. 457. Ante, 449.

## SECTION IV.

*OF CERTAIN PARTICULARS, APPLICABLE TO A TRIAL  
BEFORE A JUSTICE OR JURY.*

A cause cannot, without consent of parties, be tried at a place different from the one appointed by the justice, for the trial thereof; and where the trial was at a place different from the one mentioned in the summons, the judgment was reversed. *(u)* And the justice should be careful not to mislead the party, as to any fact material to influence his conduct in preparing for trial; for where a justice stated to the defendant, that the cause was discontinued, and yet proceeded to trial and gave judgment, it was reversed for that reason. *(v)*

The justice may, where the exigency of the case requires it, continue his court open from one day to another; as where there is a delay in summoning a jury. *(w)* And he may even hold his court open a reasonable time, to enable a party to procure a material witness—two hours was holden not unreasonable in one case; *(x)* but twenty hours was holden an abuse of discretion, where the witness was twelve miles distant. *(y)*

No other than the justice who tries the cause, has power to swear the witnesses, *(z)* and if the presiding justice be himself sworn as a witness, by another justice, who attends for the purpose, this is error, and the judgment will be reversed. *(a)* But this is, provided an objection be made thereto; for if the justice be sworn in this form, *(b)* or even give his evidence to the jury, without any oath at all, *(c)* and the party makes no objection, his consent will be presumed, which will take away the error.

A *demurrer* to evidence, is inapplicable to a justice's court. *(d)*

If the plaintiff be satisfied, that his proof is insufficient to sustain his action, he may, as we have just noticed, at any time before the cause is submitted to the justice for advisement, if he sets alone, elect to withdraw, and submit to a non-suit. *(e)* And if the trial be by jury, he may do this, when they return to

*(u)* 12 John. 417.*(v)* 12 John. 378.*(w)* 2 Caines, 134. id. 137, per Kent, C. J.*(x)* Ante, 509*(y)* 13 John. 469.*(z)* 1 id. 520.*(a)* id.*(b)* 8 John. 470.*(c)* 7 id. 198. 12 id. 296.*(d)* 3 Caines, 140.*(e)* Ante, 527.

deliver their verdict, before the same is pronounced by the foreman.(f) And if on such return, he does not appear, on being called, the verdict cannot be received, but the justice should give a judgment of non-suit against him,(g) in like manner, if, in the opinion of the justice, the testimony offered does not support the action, he may, after the plaintiff has closed his evidence, give judgment of non-suit against him, without hearing the defendant's proof.(h) But as it requires considerable legal information to exercise this branch of the proceedings correctly, it is certainly most advisable for the justice to non-suit only in plain cases. For instance, should the plaintiff ground his action on a written instrument, and fail to prove the instrument, or in cases equally plain, the justice should non-suit the plaintiff, and discharge the jury (if there be one) noting the non-suit in his docket.(i)

## SECTION V.

## OF TRIAL BY JURY.

After issue joined, and before the justice has proceeded to inquire into the merits of the cause, either party may demand a trial by jury.(j) But an issue must first be joined, and it is erroneous to award a venire, where the defendant has not pleaded.(k) This issue must be an issue of fact(l)—not a demurrer or issue of law ;(m) for this must be decided by the justice only.(n) We have already noticed what will, in general, be deemed an enquiry into the merits of the cause : (o) but the mere inspection by the justice, of the note in question in the cause, will not be deemed such an enquiry into its merits as to preclude the demand of a jury.(p)

Where a venire has once been issued, the justice cannot then try the cause without a jury ;(q) though this would be otherwise where the party objecting had himself suppressed the venire.(r) And so where the venire demanded by the party is not returned, and no further venire is demanded by him, but he contents himself with moving for a non-suit on that ground, which motion the justice overrules, and holds the par-

(f) 5 John. 346.

(g) id.

(h) 12 John. 299. Penn. on Small causes, 175.

(i) Penn. on small causes, 175.

(j) 1 N. R. L. 391, s. 9, &amp; vide ante, 526.

(k) 3 Gaines, 219.

(l) Vide ante, 501.

(m) Vide ante, 500, 501.

(n) 18 John. 140.

(o) Ante, 526.

(p) 1 John. 142.

(q) 8 John. 460.

(r) 2 Caines, 134.

ties to a trial, this has been holden right.(s) And so the party may expressly waive a trial by jury after his venire has issued, or his conduct may amount to a waiver thereof, as in the last cited case.(t)

*Form of the venire.*

**SARATOGA COUNTY, ss.**

*Philip Green, Esq.* One of the justices of the peace of the said county, to any constable of the town of Saratoga Springs, in the said county, greeting: You are hereby commanded, in the name of the people of the state of New-York, to summon twelve good and lawful men, being freeholders of the said town, to be and appear before the said justice, at his office in the said town, on the 10th day of September instant, at one o'clock P. M. to make a jury for the trial of an action of trespass on the case, between *James Jackson*, plaintiff, and *Richard Roe*, defendant, now depending before the said Justice, and who are in no wise of kin to either party, nor interested in the said suit. And have you then there a pannel of the said juror's names, and this precept thereof fail not at your peril.— Given under my hand, at the said town, the 1st day of September, A. D. 1820.

*Philip Green, justice.*

This venire should not only be directed to.(u) but executed by a constable of the town from which the jury is summoned, and in which the cause is tried.(v) But should it happen to be wrongly directed, as to a constable of the county generally, yet if it is executed by the right constable, *in fact*, the defect is merely matter of form, and the judgment will not for that reason be reversed.(w)

Preserve the character of the parties in the venire, as ante 249, 250.

As the constable is the officer recognized by law to execute this process, it is doubtless sufficient (as the uniform practice is) to serve it by a parol summons to the juror, to attend at the time and place mentioned in the venire, stating to him the name of the justice who issued it, with the parties in the suit. The jurors should have a reasonable time after notice, as in case of witnesses.(x) In this case, the officer's return, with the pannel, will be, at least, *prima facie*, and perhaps *conclusive* evidence of the venire being duly served, on a pro-

(s) 7 John. 198.

(t) id. 8 John. 460, per Cur.

(u) 1 N. R. L. 391, s. 9.

(v) id. 13 John. 227.

(w) 13 id. 227.

(x) Ante, 518.



ceeding against a juror for his non-attendance, (y) for it is a general rule, that an officer's return, made officially, is *prima facie* evidence, even between third persons. (z)

*Form of return to a venire.*

I have duly summoned the several persons, whose names appear upon the annexed pannel, as I am within commanded. Dated the 9th Sept. 1820.

Thomas Noakes, Constable.

On the day of trial, the constable is to prepare a ballot with each juror's name, of the same size, and rolled up in the same, manner, as nearly as may be, and put into a box or some convenient thing, and then deliver the same to the presiding magistrate. The justice, or some indifferent person appointed by him, then draws, one by one, six of the jurors who are present, and unexceptionable, if so many appear. (a) If a sufficient number do not appear, the justice may, at the prayer of either party, award a *tales de circumstantibus*, that is, he may require the constable to summon on the spot a sufficient number of persons, by-standers, qualified to serve on the jury, to complete the number required of those who are absent, or set aside as incompetent, (b) and this may be done, though only one competent juror appear. (c) Should there still be a deficiency, the justice may, without doubt, unless the parties amicably agree on some different arrangement in the cause, continue his court open, holding the parties, jurors, &c. present in attendance, until the constable shall summon from the town, the number of jurors wanted. (d) This is to be done, under a precept in nature of a writ of *tales* at the common law, and is in the same form of the venire, with this difference, that instead of the full number of jurors originally wanted, it commands the constable to summon "three good and lawful men, &c" (or other number wanted) "to make so many of a jury, &c." The justice may, if necessary, issue this process from time to time, till there be a full jury. On the juror's appearing upon a *tales*, they are called and sworn without being balloted for, though subject to the same challenges as regular jurors.

If no jurors appear, or none are found competent, or if the venire is quashed, or not returned, or the array challenged for good cause, &c. a new venire must be issued from time to

(y) Vide 14 John. 482. 11 East, 297. 4 Burr. 2129.

(z) 11 East, 297.

(a) 1 N. R. L. 391, 2, s. 9.

(b) 1 N. R. L. 330. 2 John. 386.

(c) 10 Co. Rep. 103.

(d) Vide 2 Caines, 134. 2 John. 9.

time, until a jury is obtained, qualified to try the cause.(e) In such case, the second venire will be deemed the process of the party demanding the first, who, consequently, will have no right to object to any error therein.(f) But if the party demanding a venire, go to trial, in such case, without requiring a second venire, it is a waiver of the trial by jury.(g) The party demanding the jury process, cannot object to the form of it.(h) It should preserve the characters of the parties, as mentioned ante, 219, 50 ; but, in a proceeding against joint debtors, the venire need only mention the names of those who are duly and personally served with process, and who appear in court.(i) Every defect in a venire is cured, if the party go to trial upon it without objection.(j)

The number of jurors to be summoned under the 25 dollar act, is 12 ;(k) under the 50 dollar act, 20, if demanded ;(l) but if 20 be not demanded by the party, the justice is to issue his venire for 12 only, under the 50 dollar act.(m) Six jurors only are drawn under either act, unless 20 be demanded under the latter, in which case, the number required to try the cause is 12.(n)

#### OF CHALLENGES.\*

Before the jury are sworn, if a party have any objection either of interest, or favour or for other cause against the constable summoning them, or any of the jurors, whether originally summoned as such, or called as *tales men*, he must state his objection to the justice, which is called a challenge. A challenge is of two kinds : 1. To the array, 2. To the polls.

1. A challenge to the array is, upon the ground, that the person returning the *venire* or *tales*, is, either unauthorized, as not being a constable at all, or not being a constable of the town where the cause is tried,(o) or other want of authority, or that he hath an interest, or partiality, against the party challenging, or hath committed some irregularity, &c.

This challenge to the array is two fold, viz. a *principal challenge*, and a *challenge to the favour*. The following are the most usual grounds of a *principal challenge* to the array : viz. that the party nominated any juror summoned ; that the constable is liable to be distrained upon by the party, or is his servant, coun-

(e) id & vide 7 John. 198. 8 id.

460

(f) 2 Caines, 131.

(g) 7 John. 199.

(h) 2 Caines, 134.

(i) 4 John. 222.

(j) 2 Caines, 134. 3 id. 275.

(k) 1 N. R. L. 391, s. 9.

(l) Laws, sess. 41, ch. 94, s. 22.

(m) 18 John. 130.

(n) id.

(o) 13 id. 227.

seller or attorney, or act as his advocate, (p) unless indeed the parties agree that he should summon the jury notwithstanding such objection exist; (q) or if the constable be any ways interested, (against the party challenging) in the question to be tried, and this, whether it be in the cause to be tried, or in any other cause, or matter, depending on the same point of controversy; or, if he has been god-father to the party's child, or the party to his, or if either party has brought an action against the constable; or there be any action depending between him, and the party, (whether as plaintiff or defendant) which implies malice, such as slander, battery, and the like. Another cause is, that he is an inhabitant of a town, or a freeman, or member of a corporation or city, which is to be benefitted by a part of the penalty going to the poor, &c. (r) And consanguinity (*relation by blood*) between the constable and party, however remote, is also a principal cause of challenge. Even relationship in the ninth degree, has been holden a sufficient objection. So affinity by marriage, between the party and the constable's cousin, or the constable and the party's cousin, has been holden a ground of principal challenge, but the challenge must show how they are related. (s) Even if strangers make the pannel, without the interference of the party in the cause, or his agent or friend, though it be not favourable to one side or the other, yet it is a principal cause of challenge to the array; (t) and Chief Justice Pennington gives this good advice; that the constable should be very careful, and not suffer any person to suggest any thing to him about the pannel, and by all means to disregard it, if they should. (u)

The above, and other grounds, which raise such a manifest presumption of partiality as, if true, to set aside the array, are principal causes of challenge. (v) But where the cause is for interest, partiality, or affinity, the party cannot, of course, object or challenge to the array, or to the polls, unless the bias is against him. It does not lie in his mouth to challenge, because the interest, &c. is in his favour; nor has a justice a right to challenge a pannel of jurors, and issue a new *venire* on his own motion, without an objection by the party, (w) and so, I presume, of any other challenge.

A challenge to the favour is, for facts, which are not deemed in themselves conclusive evidence of partiality, but which leave room for doubt, and from which triers may infer, that the

(p) 10 id. 107.

(q) id.

(r) 2 John. 194. 3 Burr. 1847.

(s) For most of the above causes of challenge, vide Bac. Ab. tit. Juries (E) & causes there cited.

(t) Penn. on small causes, 167. Co. Litt. 156. a.

(u) Penn. on small causes, 167.

(v) Co. Litt. 156.

(w) 15 John. 469.

officer is not indifferent ;(x) as if there is a relation by marriage between the cousin or son of the constable, and the party ; (y) that the party is subject to be distrained on by the constable, or that the constable hath an action of debt, or the like, against the party ;(z) that the constable and party are fellow servants ;(a) or the party servant to the constable ;(b) and so of any cause, from which triers may infer that he is not entirely indifferent between the parties.

If the challenge to the array be found against the party, he may yet have his challenge to the polls ; but neither party shall take a challenge to the polls, which they might have had to the array.(c)

2. Challenges to the polls relate to the individual juror, or *talesman*, called. These are also subdivided into *principal challenges*, and *challenges to the favour* of the juror, &c. objected to. The same causes, whether principal, or to the favour, which we have seen will set aside the array, are equally valid against the individual juror, so far as they apply. But by statute, sess. 43, ch. 37, s. 3, in an action for a penalty, under the "act to lay a duty on strong liquors, and for regulating inns and taverns," under "an act to prevent the destruction of deer ;" and "an act to prevent horse racing, and for other purposes ;" and "an act to prevent excessive and deceitful gaming," it is no objection, as formerly, to the competency of any *juror* or witness in any such suit, that he is a taxable inhabitant of the town where the action is brought.(d) The following are also principal causes of challenge to the polls, viz. that the juror is not qualified, being an alien ;(e) but this is no objection after verdict upon a writ of error.(f) It is also a principal cause of challenge, that the juror has before given his opinion on the subject in controversy ;(g) but not where he expresses a conditional opinion merely ; as where a juror said, that "if the reports of neighbours were correct, the defendant was wrong and the plaintiff was right."(h) So it is a cause of principal challenge, that the juror is not a freeholder(i) of the town where he resides,(j) but if he be a freeholder in right of his wife, it is sufficient.(k) It is also a principal cause of challenge, that the

(x) Co. Litt. 156.

(y) id. & vide Penn. on small causes. 169.

(z) Co. Litt. 156.

(a) Dyer, 367. pl. 40.

(b) Cro. Eliz. 581.

(c) Co. Litt. 156. b. id. 157. b.

(d) Vide 2 John. 194. 3 Burr. 1847.

(e) 6 John. 332. 4 Dall. 353.

(f) 4 Dall. 353.

(g) 1 John. 316.

(h) 8 id. 445.

(i) Vide ante, 254.

(j) 11 John. 168. 1 N. R. L. 391.

(k) Co. Litt. 156. b.



juror is a minor, *(l)* or a slave, *(m)* or that he is of kin to any member of the corporation that sues ; *(n)* that he hath before given a verdict in the same cause, or on the same question in another cause ; *(o)* but in order to make this a principal cause, the record of the former trial must be shown : Otherwise, it is a challenge to the favour only. *(p)* It is also a principal cause of challenge, if the juror hath been an arbitrator chosen by either party, and been informed thereof, or that after being returned, he hath eaten or drank, at the charge of either party, or if either party labour the juror, and give him any thing to give his verdict. *(q)*

The above causes of challenge to the polls are, for *disqualification* or *favour* ; another objection is, that a juror has committed some crime, of which he has been convicted, as treason, felony, or any other offence punishable by imprisonment in the state prison, *(r)* but his competency is, generally, restored by pardon.

The causes of challenge to the favour are indefinite. Jurors should in this respect be free from all manner of exceptions. *(s)* Such is the purity of our law, that no man shall have his cause tried by a juror, against whom he can raise a reasonable ground of suspicion, as to his indifference. There are a thousand strings by which the human heart may be touched, and passions by which it may be affected, that are not reducible to any general rule. These may bias the mind as much, and sometimes more than circumstances which raise more evident presumption of partiality. Close and intimate habits of friendship with one of the parties, will frequently cause a stronger bias in the mind, than more open causes ; and this is the more dangerous, as it often hath a secret unknown effect upon the mind that the juror himself is no way sensible of, and therefore takes no pains to guard against it. If it can be proved by the conduct or conversation of the juror, that he hath an inclination in favour of one party more than another, or any enmity between the juror and one of the parties, or a family dispute between them, all these and numberless other causes are sufficient to be put to triers, to declare the indifference or unindifference of the juror. Any circumstance which can be raised, showing that the juror is not wholly free from a reasonable suspicion of bias, is sufficient for the triers to set him aside. These causes of challenges to the favour, very frequently happen from circumstances

*(l)* id. & vide id. 172 b.

*(m)* id. 156. b.

*(n)* id. 157. a.

*(o)* Kirby, 166.

*(p)* Co. Litt. 157. b.

*(q)* Co. Litt. 157. b.

*(r)* id. 157. b. 158. a. Penn. on small causes, 172.

*(s)* 2 John. 194.

which no way impeach the juror. It is no dishonour to be the intimate friend and companion of any man in good credit, nor is it any offence to resent injuries, and differ with a man that treats you ill; nor is it any impeachment of a man, that on two of his neighbours' differing, he should feel an inclination that one should prevail over the other; yet in either of these cases, a person thus circumstanced, cannot be said to stand free from a suspicion of bias.<sup>(t)</sup> The causes of favour are infinite;<sup>(u)</sup> and with regard to all cases of challenges to the favour, in the strong and emphatic language of Lord Coke,<sup>(v)</sup> "The rule of law is, that the juror must stand indifferent, as he stands unsworn."

*Concerning the time when a challenge is to be made:*

If you have divers causes of challenge to the array, or to the polls, they must all be made at once, and cannot be tried separately. If one party challenge, and the juror be found indifferent, the other party may then challenge. After you have taken a challenge to the poll, you cannot challenge the array;<sup>(w)</sup> but a challenge to the array may be made at any time before one of the jurors sworn, and a challenge to the polls at any time before the juror challenged is sworn,<sup>(x)</sup> but after he is sworn it is then too late.<sup>(y)</sup>

*Concerning the manner of making, and trying the challenge:*

If the challenge be a principal one, either to the array or the polls, the cause, or facts which are the ground of challenge, must be stated to the justice in writing or by parol, whereupon the opposite party may either take issue by denying the truth thereof, or demur, upon which a joinder in demurrer follows, as in pleading.<sup>(z)</sup> A demurrer admits the facts, as in other cases, and presents a mere question of law to be determined by the magistrate, and this, whether the challenge be to the array, or to the polls.<sup>(a)</sup>

If the facts alleged as the cause of a principal challenge to the polls, be denied, it is tried by the justice himself, on the oath of witnesses, who are sworn in this form:

*Form of oath to witness upon trial of a challenge:*

"You shall true answer make to such questions as may be put to you, touching the challenge depending."

(t) Vide Penn. on small causes, 172, 3.

(v) Co. Litt. 137. b.

(w) id.

(x) id. 153. a.

(x) Penn. on small causes, 170.

(y) 17 John. 133.

(z) 3 Wood. Lec. 346. n. (i) & vide ante, 499 to 501.

(a) 9 John. 260.

The juror himself may be sworn in this form, and examined to any point, which doth not tend to discredit or dishonour him, or subject him to punishment. Thus, he may be asked whether he is a freeholder or not, (b) or whether he hath given his opinion and the like, but not whether he hath been convicted and punished for an infamous crime. (c)

If issue be joined on a challenge to the array, the justice may, in his discretion, appoint two triers from among the jury or other good men, (d) whose duty it is to try the question presented, and report their finding to the justice.

#### *Oath of triers.*

You shall well and truly try the issue of challenge joined, between *James Jackson*, plaintiff, and *Richard Roe*, defendant, and a true finding make.

These triers are to find the facts stated in the challenge *true*, or *untrue*; and upon reporting it to the justice, he gives judgment accordingly that the pannel be *quashed* or *affirmed*.

If the challenge be to the array, for favour in the constable, the party states to the justice, generally, *that he challenges the array for favour in the constable*; to which the other party cannot demur, but must take issue upon it. This is then tried in the same form as a principal challenge upon an issue taken; and the finding of the triers is *in terms*, that the constable is either *indifferent* or *not indifferent*, between the parties, which is followed by the judgment of the justice as before stated. The form of the trier's oath, is in this case substantially the same as on the trial of a challenge for favour to the polls, which form we shall give presently.

If a challenge to the polls be for favour, the party challenging states to the justice, *that A B, the juror called, is not indifferent between the parties, for which cause he challenges him*; and if the opposite party deny this the proceeding is as follows: If a juror is challenged before any one of the pannel be sworn, two triers shall be appointed as we mentioned before, on issue upon a challenge to the array, who shall proceed to try him as in that case directed; and if he be found indifferent and sworn, he and the two triers shall try the next juror challenged; and as soon as two jurors be found indifferent, the two first triers

(b) 16 id. 180.

(d) 9 John. 260.

(c) Vide cases cited Bac. ab. tit.

Juries, (E) 12.

shall be discharged ; and if there be any more challenges, the two jurors tried and found indifferent shall try the rest. If two jurors are sworn before the challenge is made, they are sworn as triers in all cases, but if one be sworn without challenge, and the next be challenged, two triers must be appointed and sworn with the first, who, together with him, constitute the triers ; the two persons selected for that purpose to be discharged as before mentioned, on two jurors being found indifferent.(e)

*Form of the trier's oath.*

You shall well and truly try, whether A B. the juryman challenged, stand indifferent between the parties to this issue.(f)

The triers then sit and hear the evidence, the witnesses being sworn, according to the form before given. They ought conscientiously to determine, and if, from the evidence given, they think there is reasonable ground of suspicion, that the juror challenged doth not stand wholly indifferent between the parties, they ought, without doubt or hesitation, to find the challenge true ; and on the other hand, if they think from the evidence that the juror stands entirely free from any reasonable suspicion of bias, they will find the challenge not true.(g)

If a challenge be properly taken, it is the duty of the justice to receive, and determine it ; and where a challenge is improperly overruled by the justice, though the party, afterwards, go to trial, it is no waiver of the objection, but the judgment will, notwithstanding, be reversed.(h)

*Of proceeding, when a sufficient number of jurors appear.*

When a sufficient number of unexceptionable jurors appear, after all challenges (if any) are heard and determined, they are next sworn according to the form given by the statute,(i) which also prescribes the form of the oath to the witnesses. These oaths being given in full form by the statute, I shall not repeat them here. The different forms of administering them will be found ante, 256, so far as religious scruples are concerned.

In conducting the evidence, the party that hath the affirmative begins. This is generally the plaintiff, unless the defendant contents himself with pleading affirmatively some special

(e) Vide Penn. on small causes, 173, 4, & vide also Bac. ab. tit. Jurors, (E) pl. 12, & cases there cited.

(f) Salk. 152, pl. 1.

(g) Penn. on small causes, 174.

(h) 1 John. 316.

(i) 1 R. L. 392, s. 9.



plea, without joining with it the general issue. After the party thus holding the affirmative goes through, the adverse party follows : when he is done, the party having the affirmative will be permitted to give evidence to rebut the testimony of his adversary, and impeach the credit of his witnesses ; and then the other party the same. In practice, it is usual for one party after the other to examine what witnesses they choose, until they are both through with their evidence. *(j)* If, from the length of the cause, an adjournment is made from one day to another, or for any other time, and the parties do not agree that the jury may separate by consent, they should be kept together, and the constable sworn to take charge of them, in this form :

*Oath to keep jury during adjournment.*

You shall well and truly keep this jury, and neither speak to them yourself, nor suffer any person to speak to them, touching any matter relative to this trial. *(k)*

After the evidence is closed, the parties, by themselves or counsel, may make such observations to the jury as are applicable to their case : the party holding the affirmative to close the argument. *(l)* This is the natural order of the trial, either before the justice or jury.

After the evidence is closed on both sides, and before the cause is submitted to the jury by the parties, it frequently becomes a question, whether either party may call further testimony in the cause. After the cause is finally submitted either to the justice or jury, it is then clearly too late. At any time before this, or at any time before the counsel on both sides have closed their arguments, it is discretionary with the justice, either to admit, or reject such further testimony ; and if such discretion be exercised properly, either in receiving or refusing it, the judgment will not for that reason be reversed. It can never be claimed by either party at trial, as a matter of strict right to open the cause to proof, after full opportunity has been given to each side to be heard, and the testimony has been regularly, and by mutual consent closed. The subsequent admission of testimony must rest upon the discretion of the court, duly exercised according to the circumstances of the case. *(m)* If the opposite party be present, with his witnesses and proofs, it will be reasonable to receive the additional testimony offered ; for then, no injury can result to him ; but if, after the party offer-

*(j)* Penn. on small causes, 175.

*(k)* 6 T. R. 530.

*(l)* Penn. on small causes, 175.

*(m)* 2 John. cas. 319, per Kent, J.

ing the testimony, declares he has done with the examination of witnesses, and the opposite party, or his witnesses have, in consequence of this, left the court, it would be unreasonable to receive such additional testimony, unless the opposite party and his witnesses are first recalled. Witnesses are not bound to stay after the parties have declared, that they have done with the proofs, for this is equivalent to a discharge of the parties. The admission of the supplemental proof, is in fact a fresh trial of the cause, and unless the party have full opportunity to be present with his witnesses, to repel the testimony, if in his power, he has just cause to complain on the ground of surprise. *(n)* On the other hand, where the counsel for the defendant had summed up to the jury, and while the plaintiff's counsel was proceeding to close the argument on his part, the defendant's counsel stated to the judge, that he had just discovered some material testimony on his part, which he offered, but the judge rejected it, supposing that he had no discretion; none of the objections above stated appearing, it was holden erroneous, and the verdict accordingly set aside. *(o)*

These proceedings may also, as we before observed, be intercepted by a non-suit as mentioned ante, 528. This must be before the cause is finally submitted to the jury. The justice has no right afterwards, to order the plaintiff non-suited. *(p)*—The room for the hearing of the cause should be kept quiet, and the jury afforded every facility for hearing the cause, possible. They should be kept as distinct as may be from the interference of either the parties or strangers; and it has been holden in one case, that where the justice permitted the jury to be treated with spiritous liquor during the trial, though it was with the consent of both parties, this was irregular, and the verdict and judgment were set aside, on certiorari, for this cause. *(q)*

In case there is no non-suit, after the evidence is closed, and the parties, or their counsel have finished their observations, the jury may, if they please, give their verdict immediately without being alone *(r)*. But, in all cases, where any doubt or difficulty can possibly arise, it is best for the jury to take some time to deliberate on the evidence, in which case they must be alone. For this purpose, a constable is sworn, according to the form given by the act which see *(s)*. In all cases where the jury retire, it must appear that a constable was sworn to attend them, unless otherwise agreed, or it will be error. *(t)*

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*(n)* id.

*(o)* 7 John. 306.

*(p)* 3 John. 430. Penn. on small causes, 175.

*(q)* 15 John. 455.

*(r)* 8 id. 437.

*(s)* 1 N. R. L. 392, s. 2.

*(t)* 11 John. 532.

It is proper to notice here, with regard to these oaths to the jury, witnesses, and constable, the forms of which are given by the act, that it was formerly holden error, where they were not administered word for word, according to the form prescribed. This decision grew out of the great strictness of the common law, in requiring a rigid adherence to statute forms, and where a justice in his return mis-recited the form of the constable's oath, the judgment was for that reason alone reversed.<sup>(u)</sup> To remedy this, the statute, 1 N. R. L. 397, sec. 17, was passed, which renders it necessary, that the party alleging such defect for error, should object at the time the oath is administered, and unless this be done, the judgment will not now be reversed for such cause.<sup>(w)</sup>

If the jury do not retire, a constable need not be sworn to attend them.<sup>(w)</sup> And it is erroneous to swear any other person to this charge, when they do retire.<sup>(x)</sup> unless indeed the parties agree to this, which if they do, or agree that they may retire without any person to attend them, this will take away the error.<sup>(y)</sup> And if they agree that the jury may retire without any constable to attend them, neither party can afterwards object to the verdict, on certiorari, because the jury eat, drink, or admit other persons to their room.<sup>(z)</sup>

The jury, in a justice's court, have a right to decide both the law and the fact, subject to a review upon certiorari, if they decide erroneously.<sup>(a)</sup> And the law of trial by jury in other courts, applies to this. <sup>b)</sup> Accordingly, after going out of court, they shall have no evidence with them, except what was shown to the court, as evidence upon the trial; nor even this, without the direction of the court. The justice may permit them to take to their room letters patent, and deeds under seal, and exemplifications of evidence given in the Court of Chancery, if the witnesses who gave such evidence be dead;<sup>(c)</sup> and so any publick documents, which are evidence of themselves;<sup>(d)</sup> and by parity of reason, I presume, exemplifications of records, and a justice's certificate duly authenticated to prove a proceeding before him; but not a private writing without seal, unless by consent of parties. If they examine a witness by themselves, though the same evidence which was given in court, it would avoid the verdict,<sup>(e)</sup> but they may come back into court to hear the evidence of a thing whereof they are in doubt.<sup>(f)</sup> If a par-

(u) 2 Caines, 134.

(v) 3 John. 430.

(w) 8 id. 437.

(x) 2 Caines, 221.

(y) 11 John. 134.

(z) id.

(a) 8 id. 436.

(b) 7 id. 32.

(c) Bull. N. P. 308.

(d) Cro. Eliz. 411.

(e) id. 189.

(f) Co. Litt. 227.

ty, or any one for him, deliver a letter, or other writing to the jury, it shall avoid the verdict ;(g) but not so, if the jury do not look at it.(h) So it will avoid the verdict, if they eat or drink at the charge of one of the parties, after they have departed from court, and before verdict given.(i) The jury should be particularly careful while out, not to suffer either party, nor even strangers to have any kind of communication with them ; nor should they suffer any facts detailed by one of their number, that have not by him been given in evidence at the trial, in the presence of the parties and justice, to have any weight in their determinations ;(j) for every man ought to know what testimony is brought against him, that he may have an opportunity to rebut it by counter evidence, or explain it by circumstances.(k) And, accordingly, it has been repeatedly ruled by the Supreme Court, that a justice cannot decide from his own previous knowledge, but only on evidence produced before him in court.(l) If the jury are desirous of hearing a witness re-examined, or receiving some explanation of a piece of testimony, about which there is a misunderstanding among them, or, in case they should wish the advice of the justice on a question of law, they can come before the justice, on application to him for this purpose,(m) in which case, the parties must be present, or at least have notice, and then if either of them refuse to attend, the verdict will be regular, even though the witness be sent into the jury room.(n)

It is irregular for the justice to tell the jury what a piece of testimony was, after they have returned, without the parties being present.(o) But where the jury merely asked the justice, if they could add any thing to the plaintiff's demand, to which he answered *no*, this was holden not a sufficient cause to set aside the verdict, though the parties were absent, and not notified to attend.(p) And a witness may be privately examined by the jury, with the consent of parties.(q) In no case can the justice go and confer with the jury, unless by consent of parties ; and if he do so, no matter what he says to them, be it right or wrong, it is error, for which the judgment will be reversed ; and, in such case, the consent of parties to such a proceeding cannot be inferred from their silence. It is error, unless they consent expressly, and in terms.(r)

(g) *id.*

(h) 3 John. 252.

(i) Bull. N. P. 308.

(j) 3 Blac. Com. 374, 5.

(k) Penn. on small causes, 177.

(l) 2 John. 189. 10 John. 250.

(m) 7 John. 32. Penn. small causes, 177.

(n) 7 John. 200.

(o) 10 *id.* 239.(p) 5 *id.* 111.(q) 12 *id.* 384.(r) 13 *id.* 487.



The verdict should, in all cases, be the result of reason and calculation, and where the jury tossed up for the verdict, it was holden a high misdemeanor.<sup>(s)</sup> And it is irregular for them to agree, that each juror shall set down what sum he thinks fit, and that the aggregate, being divided by twelve or six, the quotient shall be the verdict.<sup>(t)</sup> It would, however, be otherwise, if they merely adopt this method to arrive at a reasonable measure, without binding themselves to abide the result.<sup>(u)</sup> It is the indispensable duty of a jury to pass upon every charge or demand submitted to them.<sup>(v)</sup>

If, after every reasonable endeavour to agree on a verdict, the jury, either will not, or cannot do so, they may be discharged by the justice.<sup>(w)</sup>

### *Of the verdict.*

This is the finding of the jury. It must, in all cases, be general for the plaintiff, or defendant, and the jury cannot, in this as in a court of record, find a special verdict, stating the facts, and leaving it to the justice to give judgment thereon.<sup>(x)</sup>

But when double or treble damages are given to the party by a statute, as for a trespass on land, (vide 1 N. R. L. 525,) and the plaintiff declares upon the statute.<sup>(y)</sup> the jury should find the facts specially, which bring the offence within the act. For instance, under the statute cited, the jury should find the defendant guilty, and that the trespass was not casual or involuntary, and that the defendant had not probable cause to believe that the land on which he committed the trespass, was his own; and state that they find single damages. In such case, the court may then treble the damages in the judgment. Or, instead of finding the facts specially, the jury may state in their verdict, that they find *so much*, as the treble damages due by the statute, which is perhaps the preferable mode. But, in all cases, where treble damages are given, this should expressly appear, in some way to the justice, in order that he may tax the treble costs which follow.<sup>(z)</sup>

When the jury return into court, the justice will call over their names, and if they all appear, the plaintiff should then be

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(s) 1 T. R. 11. (x) 13 John. 249.  
 (t) 3 Caines, 57. 15 John. 87. (y) Ante, 387, 8.  
 (u) 4 John. 487. 15 id. 87. (z) Vide 2 John. 342. 14 id. 323  
 (v) 2 id. 210.  
 (w) 2 John. cas. 275. id. 301. 12 John. 127.

called ; for any time before the verdict is rendered, he may suffer a non-suit, and if the plaintiff should not appear, the justice will give judgment of non-suit against him, and cannot receive the verdict.(a) If the plaintiff appear, the justice will then say, *gentlemen, have you agreed on your verdict ?* To which the foreman answers in the affirmative. The justice will then say, *who do you find for ?* To which the foreman answers, *we find for the plaintiff or defendant, so much.* The justice, after noting the verdict, will then say, *listen to your verdict as the court hath recorded it. You say you find, &c.* (repeating the verdict) *and so say you all.* If no one dissents, this must be the verdict in the cause.(b) No matter what the form of the verdict, if it be substantially in favour of the party. The justice must render judgment upon it. Thus, should the jury find no cause of action, this is substantially a verdict for the defendant (c) So if, where the defendant claims no set off, the jury find six cents damages, and six cents costs for him, it is a verdict generally for the defendant, and the six cents damages are to be rejected as surplusage.(d) And where a jury found eight cents for the defendant, the Supreme Court intended, or presumed a set off, in order to help it, though none appeared on the return.(e) So a verdict for the plaintiff, for more than he claims, is a mere formal defect.(f) A justice can, in no case, grant a new trial, in order to rectify the verdict, be it never so informal.(g) The only remedy in his court is, to request the jury to amend it, before it is recorded, in the manner we are proceeding to remark.

The jury may, at any time before their verdict is recorded, correct it, either in form or substance. They may do this of themselves, or on the suggestion and advice of the justice.— They may do it immediately, on discovering, or being apprized of the mistake, or may retire a second time, and make the correction on more mature deliberation at their room. To determine whether the jury are unanimous (as they must be, in their verdict) either party has a right to have the jury polled, in which case the justice must call them over one by one, and ask if the verdict pronounced be their's, thus : “ *Is this your verdict ?*” If it turn out, that any one of the jurors disagree with his fellows, it is no verdict, and the jury may be sent out again. If they are not polled, and the justice think the verdict palpably incorrect, he may himself send the jury

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(a) 5 id. 346.

(b) Penn. on small causes, 177, 8.

(c) 2 John. 181. Ante, 449.

(d) 3 John. 427.

(e) 2 Caines, 138.

(f) 3 John. 433.

(g) 2 id. 181.

back to re-consider it. And in one case, where they were thus sent back by the justice, and altered a verdict, which was for the defendant, into a verdict of twenty four dollars, for the plaintiff, it was holden well, and the judgment affirmed. (h) The jury may disagree to a verdict, which they have written and sealed up, and may be polled in relation to such a verdict, as well as any other; (i) and it makes no difference in this respect, that the parties agreed that they might seal up their verdict, and deliver the same in this form; (j) for a verdict is not final, until pronounced and recorded in open court. (k)

Where the jury are impannelled before Sunday commences, it is proper to receive the verdict on Sunday, if the jury do not agree before; but the justice must wait till the next day, before he enters judgment thereupon, or it will be reversed. (l) What portion of the natural day is deemed Sunday, vide ante, 278.

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SECTION VI.

OF PROCEEDINGS AGAINST A JUROR, FOR NOT APPEARING UPON A VENIRE.

The fine for not appearing on a venire, when summoned, is the same as upon a witness, for not obeying a subpœna, (vide ante, 521, 2.) The juror is to be first summoned as ante, 522.

*Form of a summons to show cause.*

SARATOGA COUNTY, ss.

*Philip Green, Esq.* one of the justices of the peace of the said county, to *Peter Doe*. Greeting. You are hereby summoned, in the name of the people of the state of New-York, (or of the overseers of the poor of the town of *Saratoga Springs*, in the said county,) to appear before the said justice, at his office in the town of *Saratoga Springs*, in the said county, on the 15th day of September instant, at 1 o'clock P. M. to show

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(h) 7 John. 32, & vide Penn. on small causes, 178. 6 John. 68.

(j) 6 id. 68.

(k) id. 68. 7 John. 32.

(i) 3 John. 255.

(l) 15 id. 119.

cause (if any you have) against the imposition of a fine upon you, for not attending as a juror in a certain cause. lately depending before E F, Esq. one of the justices of the peace of the said county, (or before me, the said P G, if the venire were issued by the same justice, who proceeds for the fine) on the 10th day of September instant, at his (or my) office in the said town of Saratoga Springs, between James Jackson, plaintiff, and Richard Roe, defendant, of a plea of trespass on the case, you having been duly summoned (as is alleged) to attend as a juror in the said cause. Dated the 10th September, 1820.

*Philip Green, justice.*

The summons is to be served in the same manner as that against a defaulting witness, (vide ante, 522.) The affidavit of service is also in the same form, (ante, 523;) and we have seen, (ante, 530,) that the return of the constable, is *prima facie*, sufficient evidence of the juror being summoned thereupon. That the cause shown, cannot be by the juror's own oath, (vide ante, 522,) the rule being the same in this case as that of a witness. (1 N. R. L. 392, s. 10.)

*Form of conviction of juror for not attending.*

SARATOGA COUNTY, ss.

It appearing to me, *Philip Green, Esq.* one of the justices of the peace in and for the said county, on examination of the matter, and on due proof made thereof, by the return of T N, one of the constables of the town of Saratoga Springs, in the said county to a venire, to him, the said constable directed, that *Peter Doe*, was duly summoned as a juror to attend before E F, Esq. (or before me the said justice) on the 10th day of September instant, at one o'clock in the afternoon of that day, at the office of the said E F, (or at my office) in the town of Saratoga Springs, in the said county, in a certain cause then depending before the said E F, (or me the said justice) and then and there to be tried, between *James Jackson*, plaintiff, and *Richard Roe*, defendant, of a plea of trespass on the case; and it further appearing to me, by the oath of *Ira Fenn*, that the said *Peter Doe* did not appear at the said time and place, when and where he was summoned to appear as aforesaid; and it further appearing to me, on the oath of the said *Ira Fenn*, that the said *Peter Doe* was, on the 12th day of September instant, at the town of *Malta*, in the said county, personally served with a summons by me issued for that purpose, by which he was summoned in the name of people of the state of New-York, (or the overseers of the poor of the said town of Saratoga Springs, according to the fact) to appear before me, the said justice, at my office, in the said town of Saratoga



*Springs, on the 15th day of September instant, at one o'clock in the afternoon of that day, to show cause, if any he had, against the imposition of a fine upon him for his said non-appearance as aforesaid, at which time and place, he, the said Peter Doe, did not appear, but then and there made default, (or that he, the said Peter Doe, did appear, and now here hath an opportunity of being heard against the imposing such fine) and no reasonable cause for the default of the said Peter Doe, in not appearing at the said time and place when and where he was summoned to appear as a juror as aforesaid, being proved on oath, or otherwise, to my satisfaction; I, the said justice, do, therefore adjudge, consider and determine, that the said Peter Doe, shall pay a fine ten dollars for his said offence, for the use of the overseers of the poor of the said town of Saratoga Springs; and also, two dollars, being the costs attending the same fine, according to the statute in such case made and provided. Given under my hand and seal, at the said town of Saratoga Springs, the 15th day of September, A. D. 1820.*

*Philip Green, justice.*

If the juror appear without a summons, the recital as to this may be omitted in the conviction.

*Form of warrant to levy the fine.*

SARATOGA COUNTY, ss.

*Philip Green, Esq.* one of the justices of the peace of the said county, to any constable of the said county, greeting: You are hereby commanded in the name of the people of the state of New-York, that of the goods and chattels of *Peter Doe*, you levy, and cause to be made ten dollars, which, by the consideration and judgment of me, the said justice, was adjudged to be forfeited by the said *Peter Doe*, and imposed on him as a fine, for not appearing as a juror in a certain cause, lately depending before *E F, Esq.* one of the justices as aforesaid, (or, before me the said justice,) pursuant to a certain venire issued in the said cause, by virtue whereof he the said *Peter Doe*, was duly summoned as a juror in the cause aforesaid, and also two dollars, for the costs attending the same fine by me assessed in this behalf, whereof the said *Peter Doe* was convicted before me, at the town of Saratoga Springs, in the said county; as by the record thereof remaining before me, will appear; and bring the said money before me the said justice, (and so on, as in warrant against a witness, ante, 525, 6.)

The mode of levying this warrant, and the power of the justice to convict, and his protection against a prosecution for the same, are, in all respects, similar to what we noticed, ante, 525, of proceedings against a defaulting witness.

It would perhaps be well to take the affidavit of some witness to prove that the juror was called, and made default at the return of the venire, in the form which we gave to prove the default of a witness, ante, 523, 4, though this may doubtless be proved by *parol* in both cases. And so may the service of the subpoena or summons : but it is more regular and safe to have all the proof in writing.

## CHAPTER IX.

### OF CONTEMPT OF COURT, AND HOW PUNISHED.

#### SECTION I.

#### OF THE JUSTICE'S POWER TO PUNISH FOR A CONTEMPT.

EVERY court has power, while in the exercise of its lawful functions, to preserve order, decency and silence, for without this power no tribunal can exist (m) This power to punish for a contempt is, therefore, incident to every court; (n) and the proper punishment of such offence is a fine or imprisonment, or both. (o) This power is by no means confined to Courts of Record. It belongs to a justice's court not only as a necessary incident, but it is implied in the words of the act, by which he is invested with *all such power, for the purpose of hearing, trying, and determining. &c. as is usual in Courts of Record in this state.* (p) And in *Sparks, &c. v. Martin, Ventris*, 1, the Court of King's Bench resolved (on the question directly arising in relation to courts not of record,) in these words, "*They may punish one that resists the process of their court. and may FINE AND IMPRISON, for a contempt to their court acted in the face of it, THOUGH THEY ARE NO COURT OF RECORD.*" And how far a single magistrate, sitting as a court, enjoys the right to commit for a contempt, and the effect of a conviction thereof, was very fully discussed in *Lining v. Bentham*, 1 Bay, 1, in the constitutional court of appeals of *South Carolina*. At a return of a warrant for a breach of the peace, against one *Duncan*, the justice refused to take the bail offered, upon which *Lining* got into a violent passion, and accused the justice of gross partiality, and abuse of power in his office of magistrate, accompanied with very abusive and disrespectful language to his face, and in the presence of a number of by-standers. The justice drew up a commitment for a contempt, and committed *Lining* to the common goal for this contemptuous behaviour. *Lining* brought an action

(m) 1 Str. 420. 1 Ch. Cr. L. 38, 9. (o) id. 2 Salk. 697. 2 Ld. Raym. 1029, per Powel, Justice. 10 John. 393. 1 T. R. 530.

(n) Vide the remarks of Johnson, J. in *S. C. U. S.* reported in *Niles' Weekly Register*, vol. 20, p. 73. 1 Dall. 329. (p) 1 N. R. L. 387, s. 1.

against the justice, and *Duncan* was admitted as a witness, and swore that the facts stated in the commitment were untrue, and a verdict was taken for the plaintiff; but the court set aside the verdict, and determined that the commitment drawn up by the justice was conclusive evidence in his favour; and that the justice was not amenable in an action for a judicial act of this nature, but only on an indictment for oppressive or corrupt conduct.(q)

Accordingly, where any person, be he a party, counsel, witness, juror, constable, or by-stander, is guilty of rude or contumelious behaviour, in presence of the court, or of obstinacy, perverseness, prevarication, breach of the peace, or any wilful disturbance whatever.(r) he is liable to conviction, fine or imprisonment, or both, on the spot.

The forms of contempt may be diversified to infinity. The following are a few, among many of the examples to be found in the books: Telling a justice "*he lies,*" or, on being admonished to take off his hat, saying, "*I do not value what you can do;*" calling the magistrate "*forsworn,*" or "*a fool,*" or to say, "*If I cannot have justice here, I will have it elsewhere.*"(s)



## SECTION II.

### MODE OF PROCEEDING TO PUNISH FOR A CONTEMPT.

When a contempt is committed, the first step is to draw up a conviction according to the truth of the case. This should invariably be done, for the protection of the magistrate; for this is conclusive evidence in justification of the commitment, &c. should an action be brought against the magistrate;(t) and tho' the warrant of commitment, will, as we have noticed, answer the same purpose,(u) a conviction is necessary, and is perhaps more efficient evidence for the purposes of justification, than a mere warrant; for it seems from the late case of *Gray v. Cookson, et al.*(v) that if a conviction be good upon the face of it, the production and proof of it at the trial, will justify the con-

(q) S. P. 8 John. 44, & vide ante, 220. 3 Caines, 170, S. P. 10 John. 393. Ante, 16, 17, 18.

(r) 4 Blac. Comm. 285.

(s) Vide Hawk. P. C. ch. 21, s.

11.

(t) 8 John. 44. 12 East, 67.

(u) Ante, 549. 1 Bay, 1.

(v) 16 East, 13.



victing magistrate, as well in respect of such facts therein stated, as are necessary to give him jurisdiction, as upon the merits of the conviction.

*Form of the conviction.*

SARATOGA COUNTY, ss.

At a court of the people of the state of New-York, holden before me, *Philip Green*, Esq. one of the justices of the peace of the said county, at my office in the town of Saratoga Springs, in the said county, under and in virtue of the act for the recovery of debts to the value of twenty-five dollars, (or of the act to extend the jurisdiction of justices of the peace, as the case is,) *Isaac Rattler*, is here convicted of rude and indecent behaviour in the said court, in my view and in my presence, in wilfully and violently assaulting and pushing one A B, whereupon he being reprimanded therefor by me the said justice, he did reply to me in contemptuous and insulting words, to the following effect, "I do not value what you can do," (or other description of the offence according to the fact,) (w) for which offence, I do now here adjudge, consider and determine, that he, the said *Isaac Rattler*, shall pay a fine of five dollars, and also that he be imprisoned in the common gaol of the said county for three days, and until he pay the fine aforesaid, or be duly discharged according to law. Dated the 10th September, 1820.

*Philip Green*, justice.

*Commitment on the above conviction.*

SARATOGA COUNTY, ss.

To any constable, and to the keeper of the common gaol of the said county, greeting: You, the said constable, are hereby commanded, in the name of the people of the state of New-York, to take and convey to the said keeper, who is hereby commanded to receive \* to his custody, the body of *Isaac Rattler*, herewith sent him by me, *Philip Green*, Esq. one of the justices of the peace in and for the said county, convicted upon my view, of indecent behaviour, by insulting me, and obstructing me in the due execution of my office, while sitting as a justice of the said county, and holding a court under and in virtue of the act for the recovery of debts to the value of 25 dollars, (or the act to extend the jurisdiction of justices of the peace, as the case is,) and sentenced therefor to pay a fine of five dollars, and be imprisoned in the said gaol for three days, and until he pay the fine aforesaid, or be duly discharged according to law; and for so doing this shall be your sufficient warrant. Gi-

(w) Vide ante, 16, 17.

ven under my hand and seal, the 10th day of September, A. D. 1820.

*Philip Green*, justice, (L. S.)

Mr. Chitty thinks, that the above general description of the offence in the commitment will answer ;(x) and gives precedents in this form ;(y) but advises, in general, to a more particular description of the offence, (z) in this warrant, than what is given in the above form. This advice certainly comports best with what is the received notion in regard to warrants of the like nature, in other cases, and what seems, by several cases cited in Hawk. P. C. B. 2, ch. 16, s. 16, to have been adjudged necessary in this very case of commitment for contempt.

For what seems to be the more proper form, therefore, vide ante, 16, 17.

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(x) Vide 1 Chitty's Cr. L. 112.

(y) 4 id. 66, 81.

(z) 1 id, 112.

## CHAPTER X.

### OF EVIDENCE.

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#### SECTION I.

#### *ITS GENERAL NATURE AND IMPORTANCE.*

THE most formidable difficulty that will present itself to the justice, as well on the hearing by himself, as the trial before the jury, will be the rules of evidence in the admission or rejection of testimony. This difficulty will discover itself in various shapes, and often in disguised forms. The intrinsic difficulty of the thing renders it next to impossible to lay down abstract rules, that will be a guide in all cases. Indeed, almost every case must stand alone, separated from others, that resemble it by some slight shade or difference, unnoticed by superficial observers, but substantially varying from the reason and ground work of its kindred case. Nothing is more likely to mislead a mind unaccustomed to legal investigation, than the resemblance of one case to another, or to some general principle, when at the same time it is substantially different.(a)

Evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other ; and no evidence ought to be admitted to any other point.(b)

The first thing therefore, we repeat, (vide ante, 526, 7) which it is the duty of the justice to turn his mind to, is, the issue between the litigant parties ; that is, as we have seen, what they have affirmed on one side and denied on the other.(c) It is important, in the first place, to ascertain on which side the burthen of proof lies ; for, in all issues, one party takes upon himself the proof of the fact in issue. This is most usually with the plaintiff, but not always so.(d)

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(a) Penn. on small causes, 149.

(b) 3 Blac. Com. 367.

(c) Ante, 501.

(d) Penn. on small causes, 149.  
Ante, 538, 9.

## SECTION II.

## THE GENERAL RULES OF EVIDENCE.

## RULE I.

*Whichever side hath the affirmative of the question, that side hath also the burthen of proof.*

Suppose in an action of trespass for taking and leading away a horse, the defendant, instead of pleading the general issue, and then pleading a justification as we have seen he would have a right to do, (e) should content himself with pleading directly, a justification, that the horse was taken under his execution, as ante, 490, and the plaintiff should reply and deny the fact.—What then would be the issue? Not the *taking, and leading away* of the horse; for this is admitted by the special plea; (f) but *whether the defendant took the horse as he alleges*. Who then affirms this fact? Not the plaintiff: he denies it. It is then the defendant, and on him the burthen of proof lies. And so of any other special affirmative plea denied by the replication (1) The case put is, to be sure, one which rarely happens, because the defendant usually precedes his special plea with the general issue, in which case, the burthen of proof shifts from one party to another. After the plaintiff has made out his case, the defendant then shows the truth of his plea, or any fact not pleaded, which is admissible under the general issue, in order to defeat the plaintiff's claim; as infancy, payment, insanity, &c. (Vide Table of Defences, ante, 414 to 423.) Here the affirmative lies with the defendant. And so, doubtless, where an action is brought for selling spiritous liquor without license, &c. though the declaration must deny the defendant's having license, (g) yet it is sufficient to prove the sale of the liquor, and it then lies with the defendant to show his qualification, by producing and proving his license, &c. and so of the like cases. (h)

And the burthen of proof some times changes sides, according to certain rules of presumption. Thus, on a plea in bar that

(e) Ante, 442.

(f) Ante, 444, 5.

(1) Of the burthen of proof in an action for tavern expenses, vide ante, 134, 5.

(g) Ante, 345, 6.

(h) Vide cases cited in Phil. Ev.

156, 7.



the defendant is a married woman, if the plaintiff proves that her husband was gone, and no account heard of him for more than seven years before the promise, the burthen is then thrown on the defendant to show him alive, for the reasons mentioned ante, 429.(i) And so, where the fact lies peculiarly within the party's knowledge, as if the defendant prove himself an infant at the time of the promise, and the plaintiff then proves a subsequent promise, which he alleges was after the infant came of age, the defendant must then show his non-age at the time of the second promise.(j)

The rule, that the affirmative must be proved, hath also the following exception: Where an action is brought for a culpable omission, or breach of duty, as where a constable is sued for not taking goods and chattels on an execution, &c. or not arresting a man on an execution or warrant, or any other officer for not doing his duty, whereby the party is injured, the negative or omission must be proved; for it is one of the first principles of justice, not to presume that a person has acted illegally, till the contrary be proved.(k)

## RULE II.

*It is always sufficient to prove the substance of the issue.*

Where the plaintiff alleges that the defendant was to do a certain act, on the payment of a sum of money, proof of tender and refusal establishes the issue, for this is equivalent to, and in substance, a payment.(l) And a plea of payment, of a principal sum and all interest due, is established by showing the payment of a gross sum, not amounting to the full interest, but which was accepted as payment of the debt.(m) And where a declaration is in trespass, for cutting down, &c. certain trees, (and by parity in trespass, or trover for taking, and converting certain goods and chattels) proof of cutting part of the trees, or taking and converting a part of the goods or chattels mentioned, sustains the issue for so much.(n) In the action of assumpsit, or debt on simple contract, the plaintiff may prove and recover a less sum than he demands by his declaration;(o) and in an action for the escape of husband and wife from execution, for a debt due from the wife before marriage, proof that the husband alone escaped, will be sufficient.(p)

(i) 6 East, 80, 85.

(j) 1 T. R. 648.

(k) Vide cases cited Phil. Ev. 158,

9. (l) 1 Wils. 115.

(m) 2 Str. 690. 5 Cranch, 11. 3 John. 229.

(n) Co. Litt. 282. a.

(o) 1 H. Bl. 249.

(p) 1 Sid. 5.

Averments in a declaration, plea, &c. which are wholly impertinent and might be struck out, without affecting the cause of action or defence, need not be proved; as if I declare on an express warranty of soundness, and state that the defendant knew of the unsoundness, if I prove the warranty and unsoundness as laid, I need not prove the defendant's knowledge, because the express warranty is enough; and a cause of action would be sufficiently stated and made out in proof, though the averment of knowledge be stricken out of the declaration.(q) And so, where I allege that the defendant *maliciously* dug under my house, and caused its fall, &c. proof that in digging a cellar adjoining me, he *negligently* did the injury complained of, sustains the issue, for the words *maliciously*, &c. may be stricken out of the declaration; and yet leave it good.(r) So in an averment, that a note was assigned, *for value received*, the words *for value received* are immaterial, and need not be proved, and the declaration is sustained, though the assignment do not contain these words;(s) but the averment that the defendant made his promissory note, setting it forth, and adding "*being for value received*," must be sustained by a note containing the words "*for value received*;" for the averment is a description of the contract.(t)

But in regard to records, writings or contracts, which make a part of the plaintiff's case, they must be proved as laid, altho' parts of them are stated which are altogether immaterial; for such records, writings or contracts are entire, and a part only cannot be stricken out, so as to square them with the evidence. The party should, therefore, set out barely so much of these, as will make out his action or defence according to their legal effect, and not *verbatim*, as in the papers, &c. themselves, for fear of a misdescription.(u)

We before noticed the great precision with which special contracts must be set forth in pleading, whether they be simple contracts or contracts under seal: and shall content ourselves with referring the reader, for the general doctrine on this subject, to our former pages, 332 to 337. It is always sufficient to state the contract according to its true sense, or legal effect, without adopting its very words, and this, whether it be in writing or by parol, sealed or unsealed.(v) When so stated, however, it must be proved as laid, or the plaintiff must fail in his

(q) 2 East, 446.

(r) 17 John. 92.

(s) 3 Cranch, 193.

(t) 10 John. 415.

(u) Doug. 665 to 669, ed. 1807,

& notes at the end of case. 3 Day, 283.

(v) Ante, 334. 10 Mass. Rep. 230. 1 Chitty on pl. 293, 9. 1 Barnwell & Alderson's Rep. 9.

action ; and I shall close this head by giving the following instances in illustration of the rule :

The plaintiff, in setting forth a lease in his declaration, stateth the rent to be payable in *quarterly payments* : The evidence was, that no particular time of payment was agreed upon between the parties ; it was holden that the plaintiff must be non-suited. (w) Declaration on a corrupt agreement, under 12 Ann. stat. 2. ch. 16. made on 21st December, 1774, giving day of payment to 23d December, 1776 : Proof of contract made 23d December, 1774, and of forbearance for *two years* ; this was holden a fatal variance. (x) Declaration, on contract by defendant, to deliver *all* his tallow to the plaintiff, at *four shillings per stone* :—Proof, that defendant should deliver it at *four shillings per stone, and so much more as the plaintiff paid to any other person* : Plaintiff non-suited. (y)—Declaration, in consideration that plaintiff would buy of defendant forty-five sheep, for 54l. 11s. 6d. the defendant undertook, &c. that they were sound :—Proof, that the price was 54l. 12s. 6d. Plaintiff non-suited, though it seems this would not have been the case, had the sum been laid after a *videlicet*. (z) Declaration that plaintiff agreed to build two houses for 500l. by a certain day, which *he had done* :—Proof, that the time had been enlarged by parol, and the houses finished *within the enlarged time* : Plaintiff non-suited. (a) Declaration, that defendant agreed to sell plaintiff 400 *bushels of oats, &c.* : Proof, that defendant agreed to sell plaintiff, so many bushels of oats, at the *Hartland Quay measure* : Plaintiff non-suited ; for the word *bushel*, means *Winchester bushel*, unless otherwise expressed. (b) Declaration, in consideration that the plaintiff would deliver certain pictures to one *Poote*, defendant promised to pay, &c.—Proof, that the promise to pay, was in consideration that the pictures should be delivered to the defendant : Plaintiff non-suited. (c) Declaration for wages, “ during a certain voyage from the port of *London*, to the coast of *Africa*, and from thence to the *West Indies* : ” —Proof, that the voyage was “ from the port of *London* upon an intended voyage to the coast of *Africa*, for slaves, from thence to the *West Indies*, or *America*, and afterwards to *London*, in *Great Britain*, or to her delivery port in *Europe* ; ” the variance in the description of the voyage between the declaration and proof was holden fatal, though the captain

(w) Doug. 665.

(x) Cowp. 671.

(y) 1 T. R. 447.

(z) 3 T. R. 67, cited *arguendo*,

by *Dampier*.

(a) id. 390. S. P. 2 John. 392.

(b) 4 T. R. 314.

(c) id. 687.

put an end to the voyage in the *West Indies*, and though the description of the voyage in the declaration was laid under a *scilicet*.(d) Declaration on contract to deliver forty bags of wheat on one market day, and sixty bags on the then next market day :—Proof of a contract to deliver forty or fifty bags the first day, and the remainder at the next market day ; the variance was holden fatal.(e) Declaration against two defendants on a warranty upon a *joint* contract of sale :—Proof of a warranty by one of the defendants, upon a contract to sell the article as his *separate* property : Plaintiff non-sued.(f)—Avowry, setting forth a lease upon 110*l.* rent :—Proof of a lease of 148 acres at 15*s.* per acre, equal to 111*l.* rent ; the variance was holden fatal.(g) Declaration in debt for rent on a demise, at 15*l.* rent :—Proof of a demise at a rent of 15*l.* and 3 fowls : variance holden fatal.(h) Declaration, that the defendant was tenant of land in F, in consideration whereof, he promised to manage it in an husband-like manner :—Proof, that the land lay in F and C : Plaintiff non-sued.(i) Declaration on a policy of insurance ; one count avers interest in A, and another count avers interest in B :—Proof, that the interest is in A and B, *jointly* : the plaintiff cannot recover under either count.(j) Declaration, that the defendants were severally indebted to the plaintiff in divers sums, and accounted with him for the same, being 21*l.* 6*s.* and, in consideration that he would forbear payment of that balance, the defendants jointly undertook to pay the same to him :—Proof, that the balance was, on accounting 20*l.* 18*s.* Plaintiff non-sued.(k)—If a bill drawn by *John Couch*, be declared on as a bill drawn by *John Crouch*, the variance is fatal.(l) And so where the defendant is sued on a note given by him and others, and the declaration varies from the note in the name of either of the defendant's co-promissors.(m) And where a note is made payable at a particular place, it is a fatal variance, if the place be not stated in the declaration.(n) S. P. 3 Campb. Rep. 463. And so, if a place be stated in the declaration, but none appear on the bill or note, but only by way of memorandum at the foot thereof.(o) In an action against a carrier, a contract is alleged to carry goods from A to B, a variance in evidence as to the *termini* is fatal.(p) Declaration on contract to pay for *half* the land taken for a certain road, is not sustained by proof of a con-

(d) 2 Bos. &amp; Pull. 116.

(e) 2 East, 21.

(f) 12 East, 452.

(g) 4 Taunt. 320.

(h) 2 Doug. 666, cited.

(i) 4 Taunt. 700.

(j) 5 Taunt. 101.

(k) 3 Maule &amp; Selw. 173.

(l) 3 Bos. &amp; Pull. 559. S. P. 4 Taunt. 810.

(m) 4 T. R. 611.

(n) 3 Campb. Rep. 247.

(o) 4 Maule &amp; Selw. 505.

(p) 2 Starkie, 385.



tract to pay for *all* the land taken therefor ;(q) nor is a declaration on a contract to *build* a ship, by evidence of an agreement to *finish* a ship partly built.(r) Declaration on a promissory note, omits to aver that the defendants are partners, or acted under a firm, but states simply, that they made the note, &c. *their own proper hands and names being thereunto subscribed*, by the name and description, &c. Proof, that one of the defendants, a partner of the others, sign the name of the firm, will not support the declaration.(s)

In an action *qui tam* for usury, the plaintiff alleged a loan by the defendant to A, for *sixty three days*, and produced a note in evidence, payable to the defendant in *sixty days*, this was held a fatal variance, although the three days of grace, added to the number of days specified in the note, would make sixty three days.(t) For form of this declaration, vide ante, 344. In regard to variance between declaration and proof, upon a note payable in specifick articles, vide ante, 93. In an action *qui tam* for taking usury, the declaration stated the taking to have been in pursuance of a loan of \$200, by means of a promissory note ; and the evidence was of a loan of \$200, and the interest thereon for *more than six months* ; this was held a fatal variance.(u) Evidence of a promise to deliver certificates of debenture, will not support an action on a promise to pay money.(v)

The law requires the same and even greater strictness in a *plea* of usury, than in a *declaration* in an action *qui tam*, under the statute of usury.(w)

We before noticed, that in setting forth a written contract, it is not necessary to describe the parties as of such a place, or degree, though they be so described in the contract.(x) This omission will therefore be holden no variance. Accordingly, in *Evans v. Smith*, 1 Wash. Rep. 72, an objection was taken at the trial, to the giving of the bond in evidence, on account of a variance between it and the declaration in this, that the defendant is, in the bond, said to be "of the county of Essex," which is omitted in the declaration. The objection was overruled, and on appeal the judgment was affirmed. So, in the same book, p. 199, the plaintiff declared, that he rented certain ground to the defendant, for the use of the *Jockey Club*, &c. in the agreement produced in evidence, the defendant was

(q) 3 John. 253.

(r) 3 Day, 312.

(s) 7 John. 468. But vide 2

Campb. Rep. 305.

(t) 4 Day, 114.

(u) id. 37.

(v) 7 Mass. Rep. 325.

(w) 10 John. 140, & vide 3 T. R. 531.

8 John. 84.

(x) Ante, 349.

styled *treasurer of the Jockey Club*, but the variance was holden immaterial. So, where a bond was payable to *James Whitlow, jun.* and the declaration described it as payable to the plaintiff, after naming him as *James Whitlow, jun. alias James Whitlock*, this was not holden a material variance.(y)

Where the contract declared upon, was, that plaintiff had bargained and sold, and defendant agreed to buy a large quantity of head matter and sperm oil, which was afterwards ascertained to be a given quantity, and the contract proved was, for the purchase of all the head matter and sperm oil, *per the Wild-man* : held that this was no variance.(z)

The place stated, either in the declaration or plea, in a justice's court, will scarcely ever be material, and consequently need not be proved. If, however, it be a part of a special contract, as in the case cited ante, 558, note (p) ; or where, in trespass on lands, or assumpsit for use and occupation, the plaintiff states a particular town, which seems to be necessary in trespass, though not in the action for use and occupation, the place must be proved as laid.(a)

The time stated in the declaration is also, in general, wholly immaterial, unless it make a part of the contract or writing set forth, and is used as matter of description in the pleading.(b) It has been determined, that the time of a penal offence, alleged in a declaration, is wholly immaterial, as in an action for selling liquor without license, &c.(c) And it is, moreover, obvious, that where the declaration is general for goods, &c. sold, work, &c. done, monies, &c. and all the cases in which a general form of declaring is good,(d) you may content yourself with proving only a part of your declaration or count, either in kind, quantity or value.(e)

For such matters as are presumed, or implied by law, and, therefore, do not call for strict proof, vide ante, 362, 3.

The rule that the proof must substantially correspond with the cause of action or defence stated, has been extended to a justice's court, by an express adjudication of the Supreme Court, on certiorari.(f)

In an action to recover the penalty given by the 7th section of the act to lay a duty on strong liquors, &c. (sess. 24, ch.

(y) 2 Munf. 510.

(z) 1 Barn. & Ald. 9, & vid. 13 East, 410.

(a) 3 Campb. Rep. 235.

(b) 2 John. 8. Ante, 317.

(c) 13 John. 253.

(d) Vide ante, 369 to 373.

(e) 1 H. Bl. 249. Bull. N. P. 129.

(f) 1 Caines, 593.

164,) the plaintiff may unite in his declaration, any number of offences, and prove what number he pleases ; but he can only recover the penalty for a single offence.(g)

### RULE III.

*The best evidence is to be produced, which the nature of the case admits.*

This is pronounced by Chief Justice Pennington, to be the great leading rule on the head of evidence, which, like Aaron's rod, swallows up all others.(h) It is certainly a very important rule ; and is perhaps to be oftener applied in practice by our courts of justice, than any other. But it is by no means a difficult one, though for want of understanding or practicing it, many causes fail, and many defences are defeated.

This rule relates, principally, to *written evidence* and *subscribing witnesses*.

1. Wherever a writing is a necessary part of the evidence, in establishing the action or defence, it must be produced. Thus, a writ,(i) or a bond, lease, or other specialty under seal, or a bill of exchange, promissory note, or any other simple contract in writing, must be produced before any evidence can be given of their contents.(j)

2. If there be a subscribing witness to such writing, he alone is competent to prove it, and must be produced on the trial.

But both these rules are subject to various exceptions.

#### EXCEPTION 1st

If the writing be of a publick nature, as if it be a state record, on file with with the secretary of state, a record of Chancery, of the Supreme Court, Court of Common Pleas : In all these cases, though the writing be directly in issue upon a plea of *nul tiel record*.(k) or otherwise, a copy exemplified under the great seal (if a state paper) or the seals of the respective courts, where those records are (which the Secretary, Register, and Clerks of the respective offices well understand the form of making out) is sufficient, as well as the record itself.

(g) 13 John. 253. 7 John. 134.

(j) Vide 12 John. 221.

(h) Penn. on small causes, 149.

(k) Vide ante, 420.

(i) 6 John. 19.

One or the other of these must be produced, when the record is directly in issue, which, in general, is only on the plea of *nul tiel record*, which is triable by the record only. When the record is only inducement, or, in other words, not directly denied by the pleadings, it may be proved as in the following exception :

#### EXCEPTION 2d.

In cases where the record is not directly in issue, but the action or defence is grounded upon some other matter, and the record is mere inducement, but yet a necessary link in the chain of testimony, or comes collaterally or incidentally in question ; there, either exemplified, or sworn copies, made and compared as hereinafter mentioned, are admissible evidence. (l)

#### EXCEPTION 3d.

A rule of court, under the hand of the proper officer, as the Register or assistant Register in Chancery, or Clerk of the Supreme Court, or Common Pleas, is itself an original and good evidence of itself, upon its mere production, without further proof, the same as an exemplification. (n) This is called an *office copy*. Copies of affidavits served on the opposite party, upon which to ground a motion, have also been holden equivalent to office copies, and, as such, are admissible in evidence. (n) A verdict alone, without the judgment founded upon it, is not evidence, (o) unless it be a verdict on an issue out of Chancery, in which case, showing the decree thereupon, will be enough. (p) But a verdict in a justice's court, is evidence, without the judgment ; for a justice cannot, like a court of record, either arrest a judgment or grant a new trial, but is bound to render judgment thereon ; and should he omit to do this, the law will, itself, attach the proper judgment to the verdict. (q)

#### EXCEPTION 4th.

A proceeding in a cause under the 25, or 50 dollar act, though it is so far a record, that it cannot be proved by parol, (5 John. 351. 11 id. 166,) yet it is proveable either by the production of the docket of the judgment, verified by the oath of the justice, (r) or, if it be the declaration, plea, pro-

(l) & vide ante, 112. Bull. N. P. 228.

(m) 1 Ld. Raym. 745. 11 John. 434.

(n) 11 John. 434.

(o) Bull. N. P. 234. Willes, 367.

(p) Bull. N. P. 234.

(q) 2 John. 181. Ante, 449.

(r) 11 John. 166.



cess or other paper in the course of the cause, by its production, verified in the same way ;(s) or a sworn copy of the docket or other paper is equally evidence.(t) And, indeed, these may all, or any of them, be proved by parol, if this mode of proof be not objected to.(u)

But the most usual way of proving proceedings in a justice's court, is, by the justice's official certificate, authenticated according to the act, 1 N. R. L. 398, s. 21. By this statute, any of the justice's *proceedings* or *judgment* may be thus verified ; and his certificate has been holden conclusive on the question, whether a matter litigated in a second suit had been tried in a former one.(v) The *judgment* and *day* of rendering it, ought, in all cases, to appear upon the face of this certificate, as the clerk's certificate refers to the date, in order to its authentication. With regard to the other proceedings in the cause, it is presumed, that the justice would be authorized to certify such part only, accompanied with the judgment, as the party may require in evidence.(w)

*Form of a certificate to prove a judgment, in an action of debt thereon.*

SARATOGA COUNTY, ss.

To all whom it may concern : I *Philip Green*, one of the justices of the peace of the county aforesaid, (or late a justice, &c. if he be out of office at the date of the certificate,) do certify, that at a court, holden at my office, in the town of Saratoga Springs, in the county aforesaid, on the 10th day of September, A. D. 1820, before me, the said justice, *James Jackson* did, by the consideration and judgment of the said court, recover, against *Richard Roe*, 55 dollars in a certain plea of trespass on the case, for the damages and costs of the said *James Jackson*. Given under my hand the 11th day of September, A. D. 1820.

*Philip Green*, Justice.

This certificate may be varied as to the cause of action, as directed ante, 338, in a declaration upon a judgment.

But suppose *Roe* has sued *Jackson*, for some demand, which arose before the above action was commenced by *Jackson*, against him, and *Jackson* has pleaded the proceedings and judgment in the above action in bar, insisting that *Roe* should have set off his demand in the first action, and wishes to prove his

(s) 3 id. 429.

(t) id.

(u) 12 John. 296.

(v) 13 id. 184.

(w) Vide id.

plea by the justice's certificate, he wants then the *kind* of action commenced ; the *process, declaration, plea, and notice*, perhaps, all set forth in the certificate. The certificate should then be in the following form :

*Form of a certificate to prove a plea in bar, that the plaintiff's demand should have been set off in a former action.*

**SARATOGA COUNTY, ss.**

To all whom it may concern : I *Philip Green*, one, &c. (as in the last) do certify, that on the 10th day of September, 1820, *James Jackson* came before me, *Philip Green*, then and from thence hitherto, to the time of the rendition of the judgment hereinafter mentioned, being justice as aforesaid, and prayed of me process by summons (or warrant) against *Richard Roe*, in a plea of trespass on the case, whereupon, I did issue a summons (or warrant) directed to any constable of the said county, commanding him, &c. (*set forth summons, or other process, by which the action was commenced,*) which said summons (or warrant) was, on the 10th day of September, in the year aforesaid, returned to me by *Thomas Noakes*, then being one of the constables of the said county, with a return thereon, stating, that, &c. (*here state return*) at which day last aforesaid came the parties aforesaid, before me the said *Philip Green*, at, &c. and the said *James Jackson* declared against the said *Richard Roe* in these words, viz : (*here set forth the declaration.*) To which the said *Richard Roe* pleaded, and gave notice in these words, to wit : (*here set forth the pleas and notice on the part of the defendant, and follow them with the other pleadings in the cause, if any.*) And thereupon the said *Richard Roe* did demand of me, that the said cause should be tried by a jury, and I did, on such request, issue a venire, directed, &c. (*here set forth the venire,*) which said venire was, on the said return day thereof, at, &c. duly returned to me by the said *Thomas Noakes*, one, &c. with a panel annexed thereto ; and the said parties appearing at the same time and place, and a jury between the said parties being chosen, tried and sworn, did say, upon their oaths, that the said declaration of the said *James Jackson* was true, and did assess his damages by occasion of the premises, to \$50, whereupon, on the said 10th day of September, I, the said justice, did adjudge, consider, and determine, that the said *James Jackson* should recover, against the said *Richard Roe*, his said damages, and also, \$5, for his costs and charges by him, about his suit in this behalf expended, making in the whole \$55, (and so on to the issuing an execution, and the return thereto, if required.)—  
Given, &c.

*Philip Green*, Justice:

And the justice may, as we before noticed, <sup>(x)</sup> state in this certificate, the matters which were tried before him, and of course, the evidence which was given, and what was submitted to, or withdrawn from the consideration of the jury, where this becomes material, and his certificate is conclusive. <sup>(y)</sup>

The above forms can be varied to meet almost any case. If there was an adjournment from one day to another, in the course of the proceedings mentioned in the certificate, and it becomes material to set it forth, state it as follows: "*and hereupon the said cause was adjourned to, &c. at, &c.*"

If the certificate omit to state what evidence was given on the former trial, or what was submitted, or withdrawn from the consideration of the court or the jury, this may be proved by parol evidence on the oath of the justice, of counsel, or a bystander, &c. This is the rule even in a court of record. <sup>(z)</sup>-- And the minutes of evidence made by a magistrate, or other person upon a trial, are no higher in degree, than their verbal evidence; and, therefore, need not be produced, though they may be resorted to, in order to refresh the memory of the witness, like all other memoranda made at the time of a transaction. <sup>(a)</sup>

*Form of the clerk's certificate of authentication.*

SARATOGA COUNTY, ss.

I, Thomas Palmer, clerk of the said county, do certify, that *Philip Green*, whose signature appears on the within exemplification, was, on the within mentioned 10th day of September, A. D. 1820, one of the justices of the peace of the said county. In witness whereof, I have caused the seal of the Court of Common Pleas of the said county to be hereunto affixed, this 12th day of September, A. D. 1820.

(L. S.)

*Thomas Palmer.*

This certificate of the justice, properly authenticated, is like a record, conclusive evidence, and cannot be contradicted by parol testimony. <sup>(b)</sup>

EXCEPTION 5th.

The right of proving papers by a sworn copy is, by no means, confined to the cases mentioned ante, 562, 2d exception. Where-

<sup>(x)</sup> Ante, 563.

<sup>(y)</sup> 13 John. 184.

<sup>(z)</sup> 16 John. 136. 2 John. 227, &  
vide ante, 449.

<sup>(a)</sup> Vide Phil. Ev. 209, & cases there cited.

<sup>(b)</sup> 13 John. 184.

ever the writing to be proved is of a publick nature, and therefore properly confined to a single place, for the inspection of all whom it may concern, a sworn copy is good evidence. Thus, not only the records, books, and other papers properly and officially on file, or belonging to the various offices of state, and of our courts of justice, are susceptible of proof in this manner; but a great variety of others of inferior importance or authority, as those in the official custody of the clerk of the board of supervisors, town clerks, school district clerks, surrogates, &c.—So, the books of a corporation, as of a bank, turnpike company, church, library, &c. &c. And it is doubtless within the same principle, that the sworn copy of a justice's docket, is evidence.(c) It is necessary that these sworn copies should be received in evidence, as well for the security of the instrument as for the convenience of the publick.(d)

A copy of a constable's surety covenant, certified by the clerk of the town where it is filed, is, by statute,(e) made, *prima facie*, evidence of its execution; that is, good evidence until contradicted, but liable to be so, which is the distinction between *prima facie* and *conclusive* evidence. In certifying this, the town clerk should make an exact copy of the instrument, and then certify it in this form:

FORM of Town Clerk's certificate of constable's surety covenant.

SARATOGA COUNTY, and town of Saratoga Springs, ss.

I certify, that the above is a copy of an instrument in writing on file in my office of clerk of the said town. Dated, &c.

A B, Town Clerk.

When the production of the original, or the copy of any paper is necessary in proof, even the confession of the opposite party, out of court, will not dispense with the necessity of producing it.(f)

Sworn copies are to be proved like other transcripts, by a witness who has himself made the copy, or compared it line for line with the original, or who has examined the copy, while another person read the original.(g) He can generally determine whether the original paper be the true one by the place where the person with whom, or the book in which, he finds it, and is to state the mode in which he examined it, under oath in court, the same as if he were brought to prove any other fact, being

(c) Ante, 562.

(d) Vide Phillips' Ev. 320, & 21, & cases there cited.

(e) 2 N. R. L. 126.

(f) 6 John. 9. 10 John. 248.

(g) Vide Phil. Ev. 291, & cases there cited. 3 Day, 499.



equally subject to cross examination. On the court being satisfied that the copy is a true one, it is received in evidence, if pertinent to the matter in issue. But no *copy* of a *copy*, examined as above, however authenticated, is admissible.<sup>(h)</sup>

#### EXCEPTION 6th.

The rule that the instrument itself must be produced, does not extend to mere written acknowledgments of facts, memoranda or notices. Thus, though a receipt be given, payment may be proved in any other way : and so, though a memorandum be made by a witness, if he can remember the same facts without the memorandum, he is not bound to produce it ;<sup>(i)</sup> and so, I presume, of an account book or any original entry touching an account. And a notice, though in writing, may always be proved by parol.<sup>(j)</sup>

#### 2. Of the rule and its exceptions, in relation to subscribing witnesses.

Any deed, or other private contracts, or matter reduced to writing, and attested by a subscribing witness or witnesses, must be proved by the witness or witnesses, whose attestation appears thereto. But where there are several subscribing witnesses, the production of one is sufficient in all cases, where the witness produced can prove the regular execution of the instrument.<sup>(k)</sup> But the law goes no farther, and it is not necessary to produce the supposed writer or signer of a contract, or other instrument, in order to prove or disprove its execution ; but this may be done by proof of the hand writing, by third persons, where there are no subscribing witnesses. Thus, you may prove the hand writing of a justice, to show that he issued process, or a constable, &c. to show his return, and so in a great variety of cases.<sup>(l)</sup>

To this branch of the rule, there are, also, the following exceptions :

#### EXCEPTION 1.

Deeds, conveyances or writings concerning lands or real estate, proved or recorded pursuant to *the act concerning deeds*,

<sup>(h)</sup> Gilb. Ev. 9. Peake's Ev. 29.  
1 Dall. 65. 4 Munf. 310.

<sup>(i)</sup> 1 East, 460. 1 Campb. Rep.  
439. 4 Esp. Rep. 163. 1 John. 340.

<sup>(j)</sup> 3 Caines, 174. 9 John. 136.

<sup>(k)</sup> Rob. on Wills, 179, & cases  
there cited. Phil. Ev. 168, 9.

<sup>(l)</sup> 2 East's P. C. 1001, 2. Phil.  
Ev. 179. But vide 4 Harris & Mc  
Henry, 392, contra.

sess. 36, ch. 97, (m) and the subsequent acts concerning the proof and acknowledgment of such deeds, &c. are evidence of themselves, and so is a registry or a sworn copy of the registry thereof. And an acknowledgment, or proof, before a man who styles himself a *judge-commissioner* or *other officer*, having authority to take such proof or acknowledgment, is, *prima facie*, evidence, that he was such; and it is not necessary for a person who offers a deed so acknowledged, to produce the commission of the officer who took the proof or acknowledgment, or to give any further evidence to prove his authority, until some evidence is given on the other side to render that fact questionable. (n)

#### EXCEPTION 2.

If a party has acknowledged the execution of a written contract, not under seal, this dispenses with the production of the subscribing witness, (o) though it is otherwise of a sealed contract; (p) and, in the first case, the acknowledgment ought to be direct and explicit; for where A demanded payment of a note of the defendant, but did not show it, nor state the amount nor date, and the defendant said he had given a note to H, which he would pay at a future day, this was held insufficient to dispense with the production of the subscribing witness. (q)

EXCEPTION to both branches of the rule, is, where the best evidence is out of the party's power.

If the subscribing witnesses are all incapable of being examined, the course then is, to prove their hand writing, or the hand writing of one of them, which latter is enough. This course may be taken, where the subscribing witnesses are dead, or blind, or insane, or infamous, or where they have become interested after subscribing, or where they are out of the jurisdiction of the court, so as not to be the subjects of a subpoena. (r) And so, in relation to a justice's court, if the subscribing witness be neither in the county where the cause is tried, nor in the adjoining county, this lets in inferior proof. (s) And so in all cases where the witness cannot be found after strict and diligent inquiry. (t)

In like manner, if the instrument wanted in evidence be out of the power of the party, as if it be lost or destroyed, without the fault of the party requiring it, or out of the reach of a

(m) 1 N. R. L. 369.

(n) 1 Peter's Rep. 429.

(o) 2 John. 451.

(p) 3 id. 477.

(q) 16 id. 201.

(r) 11 Mass. Rep. 309.

(s) 12 John. 188.

(t) In regard to this 3d exception, generally, vide Phil. Ev. 2d Am. ed. 178, & cases there cited.

*subpœna duces tecum*, or in the hands of the opposite party, upon proving either of these facts, a sworn copy or parol evidence may be given of the writing. It seems, however, to be established, that mere parol evidence of a lost record of a court of justice is inadmissible,<sup>(u)</sup> though the propriety of this doctrine is ably contested by Judge Haywood.<sup>(2 Hayw. Rep. 76, 7, 8.)</sup> And it is doubtful whether parol or other inferior evidence can be given of a written instrument, upon the ground that a witness refuses to produce it upon a *subpœna duces tecum*, where he is within the jurisdiction of the court.<sup>(Vide to this question, 1 Esp. N. P. Rep. Day's ed. 405, n. 1.)</sup> The learned editor inclines that this may be done.

If the opposite party have the paper, you must, before entitled to your inferior evidence, give him reasonable notice, either written or parol, to produce it upon the trial, unless it appear that he has it in court; for then to require previous notice would be idle.

FORM of notice in writing to produce paper.

JUSTICE'S COURT.

James Jackson, }

v. }

Richard Roe. }

SIR,

You are required to produce in evidence, on the trial of this cause, a certain execution issued by P G, esq. justice of the peace, in my favour, against *Ira Fenn*, and all other papers in your custody or power, relating to the matter in controversy in this cause, or inferior evidence will be given of their contents. Dated September, 9th, 1820.

James Jackson.

To the above defendant.

This notice may be varied to meet any other paper in the party's hands. Its service once is enough, and there is no need of repeating it every time the cause is adjourned.<sup>(v)</sup> And such notice is not necessary at all, in an action of trover or trespass for the writing itself, nor indeed in any action where the writing is described in the pleadings; for this is notice of itself; nor is it necessary where the party, without having a right to the paper, has got possession of it from a third person after the commencement of the suit.<sup>(w)</sup> This notice to produce

<sup>(u)</sup> Peake's Ev. 29, 30. 1 Bay, 264. 2 Hayw. 76.

<sup>(v)</sup> 6 John. 19.

<sup>(w)</sup> Vide Phil. Ev. 335 to 342. 1 Am. ed. & cases there cited, also 17 John. 293.

the paper may be proved, if by parol, by a third person who gave the notice, or one who heard it given, or if in writing, it may either be proved by parol, or by a duplicate original, or copy, accompanied with an oath of delivery.(x) Though the paper lost, be a promissory note, yet the plaintiff may recover thereupon, unless it be shown that the note has been negociated ; for this will not be presumed against the plaintiff.(y)

The question, whether this inferior evidence shall be received, is preliminary and collateral, addressed to the justice only, and is not taken as a part of the regular evidence in the course of the trial. Wherefore, in order to show that the subscribing witness is not capable of examination, (except for the infamy of the witness, on account of some crime, in which case the record of conviction, or a copy thereof, must be produced, and verified in the usual form ;) (z) the party himself, who wishes to introduce the evidence may be put under oath and examined by the justice, touching the facts which he insists upon as changing the degree of testimony ; as, that the subscribing witness is dead, &c.(a) And he may also be thus examined, to prove the loss or destruction of a paper, or its absence beyond the jurisdiction of the court. So, to prove notice to the opposite party to produce it. This doctrine is established by a late case decided in our Supreme Court.(b) The same doctrine seems established in Massachusetts, in *Chase, et al. v. Lincoln*,(c) where a party gave evidence of the absence of a subscribing witness ; in *North Carolina*, where it is holden, that the party must swear to the loss of his deed ;(d) that he may swear that it is not in his possession or power ;(e) or prove by his own oath the loss of a bill of sale ;(f) in *Pennsylvania*, where the plaintiff was admitted as a witness to prove the loss of a bill of exchange,(g) &c. Our Supreme Court, in the case above cited, also decide, that any witness, however he may be interested, may, as well as the party, be examined to prove the same or similar facts, indeed any facts calculated to show the propriety of letting in the secondary degree of testimony ; and the numerous decisions and cases of practice to the contrary are all overruled ; and the above doctrine settled as the ancient law of the land, proved by the decisions in *England* and *Pennsylvania*. Slight proof of loss, or even presumption of loss, from lapse of time, is enough to let in inferior evidence, in case the writing to be proved has ceased to operate or be valued, as if it be fulfilled, or discharged,

(x) Phil. Ev. 343, & cases, &c. 1 Am. ed.

(y) 10 John. 194.

(z) 8 East, 79. 14 John. 192.

(a) 1 Dall. 116.

(b) 16 John. 193.

(c) 3 Mass. Rep. 236.

(d) 1 Hayw. 4. id. 178. n.

(e) id. 410, 11.

(f) 2 id. 351.

(g) 3 Yates, 442.



&c. but become material collaterally in some suit, happening in direct relation to some other matter, &c.(h)

I am aware of the provision in the 25 dollar act, "that no oath of either party, or *ex parte* affidavit of any other person, shall be allowed or given in evidence in any such action, unless the parties agree to allow such evidence." That clause is inserted at the close of the section which regulates the trial by jury, and the mode of swearing witnesses to give evidence, in a general manner, touching the matters in difference in the cause, and must be considered according to its subject matter, which is plainly evidence to be given to the court and jury, at large, upon the issue to be tried. But this provision does not relate to a preliminary, or collateral question, cognizable by the justice alone, and merely laying the foundation of, or leading to the proper evidence upon the trial, any more than it may be said to controul the kind of proof for procuring an adjournment of the cause. Where the act does not positively interfere, it has been again and again decided, under the clause in the act itself to that effect, that the justice is to be governed by the same rules in the hearing of the cause, as a court of record.(i) Besides, the party, or the interested witness, is not, in this case, to be sworn, generally, to tell the truth, &c. upon the issue joined. This would make him a competent witness in all respects, and the oath would be binding upon him as such, which would be absurd.

#### *Form of the oath.*

You shall true answer make, to such questions, as shall be put to you, touching your ability to procure the attendance of A B, subscribing witness to this paper, as a witness in this cause. So help you God.

Or, "touching the power, or controul you have over any paper which would be proper evidence in this cause," (or other point of inquiry, proper to be put to the party, or the witness interested, but none other.)

It must then appear that the party has, either used due diligence to inquire out the witness gone, or paper lost, &c. and failed, or that the witness or paper is out of the reach of the process of the court, or other fact necessary to let in the inferior proof.(j)

(h) 18 John. 60.

(j) 16 John. 195.

(i) 1 N. L. R. 387, s. I. 2 John

If the paper be produced pursuant to the notice, the act of producing it is, *prima facie*, evidence of its execution, if the party producing it be a party to it, or claim any right or interest under it. *(k)* But in other cases, it must be proved in the usual manner. *(l)*

#### RULE IV.

In the case of all peace officers. justices of the peace, constables, deputy sheriffs, &c. custom house, or other officers, and indeed all public officers, from the highest to the lowest, proof that they are reputed to be, or have acted as such, is sufficient, without the production of their appointments. *(m)* And an officer, duly commissioned and acting in his office, is presumed to have taken the regular oaths. *(n)*

#### RULE V.

Where, by law, certain acts are to be done by a public officer, the law always intends, that they have been done, until the contrary be shown. *(o)* Thus, on a conviction for felony, it is presumed that the district attorney has delivered in a transcript to the court of exchequer ; *(p)* and within the same principle, where a justice issues a warrant, attachment, or execution, the law would doubtless presume that he did so upon the proper proof, and that such process is regular ; and so, where he renders a judgment, the previous proceedings will be presumed regular ; so, where commissioners lay out a public highway, the necessary steps for the purpose will be presumed. And so of any other act, which it is made the positive duty of an officer to perform, or see performed, as incident, or leading to the official act given in evidence. I put the above cases by way of example, as familiar instances, which I conceive to come within the last mentioned rule, though it is of frequent practical application in numerous other cases. It lies with the party wishing to impeach these acts, to avoid them by showing some slight proof, at least, that every thing is not regular, when the burthen of proof will shift to the other side. *(q)*

A word here, with respect to the nature of presumptive testimony, generally ; which is of daily occurrence in all our courts of justice.

*(k)* 2 T. R. 41, 3. 3 Taunt, 62.  
12 John. 223.

*(l)* Vide Phil. Ev. Am. ed. 346.

*(m)* 4 T. R. 366. Leach's Cr. C.

585. 3 John. Rep. 431. 6 Binney,

38. 9 Mass. Rep. 231. Rep. C. C.

U. S. first circuit, 215.

*(n)* 2 Gallis. Rep. 15.

*(o)* 14 John. 182.

*(p)* id.

*(q)* Vide Phil. Ev. 158, & cases there cited.

Evidence consists either of *positive* or *presumptive* proof.—The proof is *positive*, when a witness speaks directly to a fact from his own immediate knowledge ; and *presumptive*, when the fact itself is not proved by direct testimony, but is to be inferred from circumstances, which either necessarily, or usually attend such facts. It is obvious, therefore, that a presumption is more or less likely to be true, according as it is more or less probable, that the circumstances would not have existed, unless the fact, which is inferred from them had also existed ; and that a presumption is to be relied on no longer, when the contrary is actually proved. In order to raise a presumption, it cannot be necessary to confine the evidence to such circumstances alone, as *could* not have happened, unless they had been also attended by the alleged fact ; for that would, in effect, be to require, in all cases, evidence amounting to positive proof ; but it will be sufficient to prove those circumstances, which *usually* attend the fact. If the circumstances be such as may afford a fair and reasonable presumption of the facts to be tried, it is to be received and left to the consideration of the jury, (or of the justice sitting as a jury,) to whom, alone, it belongs to determine on the precise force and effect of the circumstances proved, and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue. However, for the purpose of trying the weight and effect of such presumptive proofs, it will often be of the utmost consequence to consider, whether any other fact happened, which might have been attended by the same circumstances ; and with which of the facts they are most consistent. (Vide Philip's Ev. 110, 11, 2d Am. ed.) Beccaria, ch. 14, observes, that, "the following general theorem is of great use in determining the certainty of a fact. When the proofs are dependant upon each other, that is, when the evidence of each witness taken separately, proves nothing, or when all the proofs are dependant upon one, the number of proofs neither increase nor diminish the probability of the fact ; for the force of the whole is no greater than the force of that on which they depend ; and if this fails, they all fall to the ground. When the proofs are independent on each other, the probability of the fact increases in proportion to the number of proofs : for the falsehood of one, does not diminish the veracity of another."

The object of a chain of proofs, inconclusive by themselves, but connectedly leading to the proof of a fact, is, to arrive at that sort of probability, which Beccaria makes synonymous with moral certainty ; "because every man in his senses, assents to it, from an habit produced by the necessity of acting, and which is anterior to all speculation." He very justly observes in the same chapter, that "it is much easier to feel this moral certainty of proofs, than to define it exactly." And to judge

of this result, "nothing is wanting but plain and ordinary good sense." The application of these remarks, must generally depend upon each case as it arises, though there are some few instances mentioned in the books, which admit of legal certainty.

A child born during lawful matrimony, is presumed legitimate. This may be disproved by circumstances, as showing the husband to be under the age of puberty, or labouring under some other natural disability, or his continued absence, or other circumstances repelling strongly the presumption of access. A child begotten and born after a divorce, from bed and board, is presumed illegitimate until access be proved.

A receipt for rent down to a certain day, is strong presumptive evidence, that all rent previously accrued, had been paid, until the contrary be proved. (15 John. 479.) Proof, that the plaintiff and other workmen of mine, come every week to receive their pay, and that I was in the habit of paying weekly, and that the plaintiff has not been heard to complain of non-payment, is presumptive evidence of payment. An order to pay money in the hands of the drawee, is evidence of payment; otherwise, of an order to deliver goods. A cash account, shown to the defendant and not objected to, is evidence for the consideration of the jury. Possession of land or a chattel is, *prima facie*, evidence of property. (Vide Phil. Ev. 2d Am. ed. with notes, p. 110 to 119, and cases there cited.)

We have seen ante. 467, when payment of money due on a specialty, will be presumed from lapse of time, &c. Judgments are now placed on the same footing by "an act concerning judgments and executions," passed April 3d, 1821, sess. 44.

Sometimes the acts of the party are conclusive, and supersede all higher or other proof. The most important instances, of which, for our purpose, are, the case of a tenant, who cannot dispute the title of his landlord; (r) and a man who suffers a woman to pass in the world as his wife, cannot contradict the fact of her being so. (s)

#### RULE VI.

*Hearsay is not evidence.*

To this rule, there are the following exceptions :

(r) Vide Phil. Ev. 1 Am. ed. 171, & cases there cited. Ante. 81.

(s) Andr. 237.



## EXCEPTION 1.

To prove a pedigree, death, relationship, marriage, whom one married, his number of children, time of marriage, &c. the declarations of members of the family are admissible, as well as descriptions in wills, upon monuments, entries in bibles and registry books, &c. &c. (t) And the declaration of one's deceased father, (u) or a memorandum of the time of one's birth, made by his deceased father, (v) is evidence of his age. But in order to make such declarations admissible, as to pedigree, the witness should be connected with the family, or have some personal knowledge of the facts of which he speaks, or have derived his information from persons connected, or particularly acquainted with the family. (w) The original entry, kept by a religious society, of the births and deaths among its members, is evidence. (x) Hearsay, and general reputation, are not admissible, to establish the freedom of an ancestor. (y) nor will hearsay be admitted as to the place of one's birth. (z)

## EXCEPTION 2.

Declarations of a third person, when they go to charge him with a debt, or otherwise operate against him, are sometimes evidence, especially in case of his death; as an entry in his book, charging himself with the receipt of money on account of a third person, (a) or acknowledging the payment of money due to himself. (b) In the cases cited, the entries were made by a deceased person, and were against his interest. If I sue for money paid, as surety on bond, note, &c. the production of the bond, &c. and a receipt of the obligee, &c. for the money, after proving them, is enough, *prima facie*, to sustain my action. (c) So the declaration of a person deceased, who once owned goods, that he had sold them to A, is good evidence against B, who claims under the deceased, by some sale or act of his subsequent to the declaration. (d) Thus, where A has a horse in his possession, but admits that it belongs to B, and after this admission sells and delivers it to C, in an action by B for the horse against C, A being dead, his admission is evidence against C. But such declarations, subsequent to the sale, would be inadmissible. (e) Indeed, the doctrine appears to be well established, that an admission, made relative to the property in

(t) Vide Phil. Ev. 174 to 182, 1st Am. ed. & cases there cited, & vide 1 Wheaton's Rep. 6. 15 John. 226. 8 John. 128. 1 Yeate's Rep. 307.  
(u) 3 East, 542.  
(v) 3 Campb. Rep. 444.  
(w) 13 John. 37.  
(x) 6 Binney, 416.

(y) 1 Wheaton's Rep. 6.  
(z) 3 East, 542.  
(a) Bull. N. P. 295. 3 T. R. 719.  
(b) 2 Str. 1129. 2 Burr. 1072. 10 East, 118. 15 id. 33.  
(c) 4 John. 461.  
(d) 1 Taunt. 139.  
(e) Vide 4 John. 412.

question, by one who afterwards sells it to another, is as much evidence against the one thus afterwards purchasing, as it would be against the vendor before the sale, and this, even though the vendor be still alive. *(f)* And both the declarations and conduct of the vendor, before the sale, are equally admissible to show fraud in the transfer. *(g)* though this would be otherwise in all cases of declarations or conduct subsequent to the sale.

## EXCEPTION 3.

The admissions of the party are always evidence against him, even though he sue merely as trustee for another; *(h)* and so is the admission of the person beneficially interested, though he be not named as a party in the suit. *(i)* An admission of one of several joint parties, is evidence against all; *(j)* and the admission of a joint debtor, though not a party to the suit, is evidence against those who are defendants. *(k)* But the acknowledgment of an account, by one partner, after a dissolution of the partnership will not bind the other; *(l)* though it would be sufficient to take the case out of the statute of limitations. *(m)* That the admission of one is inadmissible to prove another his partner, vide ante, 50. 2 Desau. Eq. Rep. 1.

In an action for a mere wrong, as in trover, trespass, or case, against joint wrong doers, the confession of one defendant, either as to their being joint trespassers, or wrong doers, or any other fact, is not evidence against the others; though it is otherwise as to confessions which are accompanied with the wrongful act, after having first established, by evidence, the wrongful combination; for then the act of one is esteemed the act of all. *(n)* And in an action for a combination, in committing a fraud, the confession of one defendant has been holden evidence to enhance the damages as to the others, the combination being first proved. *(o)* But in trespass, where the acts are entirely distinct and unconnected, as if done or said at a different time or place, by one joint trespasser, they are not evidence to enhance the damages, and ought not to be received. *(p)* These confessions of the party, whether by parol or in writing, are not con-

*(f)* Vide 2 Hayw. Rep. 288, & 652. 2 H. Bl. 340. But vide Kir-  
cases cited in note by the reporter. by, 62, 174, 203, contra.

*(g)* 14 Mass. Rep. 245.

*(h)* 7 T. R. 664. 1 Ser. & Rawle, id. 409. Ante, 47.

25.

*(i)* 11 East, 578, 9.

*(j)* id. 589. 1 Maule & Selw. 249. 14 John. 409.

*(k)* Peake's N. P. C. 16, id. 203. 3 Day, 309. 1 Taunt. 104. 2 Doug.

*(m)* 6 John. 267. Ante, 47.

*(n)* 6 T. R. 527. Phil. Ev. 73, 4.

*(o)* 1 Day, 33, & vide 1 Coxe's N. J. Rep. 13.

*(p)* 16 John. 215.

clusive, but may be done away by proof. Thus, even a receipt, though absolute in its terms, may be explained or contradicted. (q) And so, where a party had admitted his promissory note, he was allowed to show that the signature was not genuine. (10 Mass. Rep. 39.) The confession of one of a corporation aggregate, is not evidence against the corporation, in a suit either by or against it. (r)

#### EXCEPTION 4.

The acts and admissions of an agent, while acting within the scope of his authority, are evidence against his principal, because they form a part of the contract or transaction itself, but not what he may have said, or done at another time. (s) Upon the same principle, the confessions of a deputy sheriff, made while he is acting within the scope of his authority, will bind the sheriff; for instance, what he may say at the time of executing a writ, or concerning the custody of a debtor upon execution in his hands, or concerning any other execution, while the same is in force in his hands; but these confessions, in order to bind the sheriff, are restricted to the business which the deputy has in hand, while it is going on, and one case, which seems to look a little farther than this, is overruled. (t) If one refers to another for information on a disputed fact, as authorized to answer for him, (u) or employs an agent to make propositions for him, (v) the consequent replies or propositions are evidence against him, the same as his own would be.

It may be observed with regard to admissions generally, that a mere proposition by way of compromise, is not evidence against the party, though the admission of certain articles of charge, in the course of a settlement or before arbitrators, would be evidence. Whether the offer is merely by way of compromise, must be gathered from the circumstances in proof. The case commonly put is, that where A claims of B, fifty dollars, and B offers him a gross sum of twenty-five or thirty dollars, or other amount in order to settle the claim, this ought not to be received as evidence. (w)

The admissions of the party are evidence against him, whether made in writing, or by parol, whether before or after the

(q) Vide Phil. Ev. 74. n. (a) & cases there cited.

(r) 3 Day, 493.

(s) Vide Phil. Ev. 74 to 76, 1st Am. ed. & cases there cited. 2 Wheaton's Rep. 380, & vide 3 Dall. 39. 5 Binney, 195. 1 Peter's Rep. 15. 1 B. & Alderson's Rep. 247.

(t) Vide Phil. Ev. 76, 1st Am. ed. & cases there cited.

(u) 1 Campb. Rep. 366.

(v) 2 id. 9.

(w) Vide Phil. Ev. 73, 9, 2d Am. ed. & cases there cited.

commencement of the suit. And so is the recital of a fact in a deed, executed by the party, or an admission in an answer in Chancery.(x) And the receipt of a bond, and warrant of attorney, stating the particulars thereof, has been holden evidence of the bond and warrant, even without producing them.(y)

The whole of a party's answer, confession, or admission, must be taken together, in order to show distinctly the full meaning and sense of the party; as where I say, "True, I received a dollar of the plaintiff, but it was my due;" "True, I shot the plaintiff's dog, but he assaulted me in the highway;" these confessions will not sustain an action against me. "True, A signed the note jointly with me, but he did this as surety, and not as partner." This is not an admission, that A and I are partners. "I bought the goods, but paid for them;" this will not sustain an action against me for the goods. If a party, in order to establish a credit in his own favour, show an account made out by the opposite party, the whole must be taken together, but the party producing it will be at liberty to disprove any of the charges contained in it.(5 Taunt. 245.) "True, I borrowed the money, but repaid it," will not sustain an action against me for money lent. "True, I was captain of the ship, but never employed the plaintiff," will not help in sustaining an action against me for the wages.(z)

What a person has sworn to as a witness, is evidence against him, even though the questions which he answered were exceptionable, and he might have demurred to them; and so, what he has confessed as a criminal, under a promise of pardon.(a)

How far character, &c. is admissible in evidence, in the action of adultery, or for seducing the plaintiff's daughter, or servant, vide ante, 183, 9.

#### EXCEPTION 5.

Marriage, in all cases, except in the action of adultery,(b) may be proved by publick reputation.(c)

#### EXCEPTION 6.

If a witness, who has been examined on a former occasion, in a suit between the same parties, and where the point in issue

(x) id. 78, 9.

(y) 14 John. 404.

(z) Vide the cases cited Phil. Ev. 2d Am. ed. 79, 80.

(a) id. 79.

(b) Ante, 187, 8.

(c) 4 Burr. 2057. Doug. 171.



was the same, is since dead, what he swore on the former trial may be proved by one who heard him. And so, on a second trial, when the witness who swore on the first, between the same parties, and to the same point, is kept away by the contrivance of the opposite party. But the witness, who heard and undertakes to give the evidence of such deceased or absent witness, must repeat his very words, and cannot be allowed to swear merely to their effect; and a foundation must always be laid for this proof, by showing in a regular and legal manner, the pendency and trial of the former cause. *(d)*

The declarations of a person in his last moments, and under a knowledge of his approaching dissolution, are not evidence in a civil cause, though the contrary was formerly holden for law. *(e)*

### RULE VII.

Verdicts, judgments and decrees, are not, in general, evidence, except between the same parties; but between these, they are conclusive, as to all matters determined by them.

To this rule, there are the following exceptions, among others :

#### EXCEPTION 1.

In order to be conclusive in the second suit, the parties in the first, must sue in the same *quality or character* as in the second. Thus, if I sue for a claim in my own right and fail, I am not precluded by this judgment, from afterwards suing for the same cause, as executor or administrator; and so of the like cases. And it must, moreover, appear, that the same matter was in issue, and determined, in the first, as in the second action. *(f)* I have already considered this last position, in speaking of the plea of a former action in bar, and its kindred pleas, ante, 449 to 451.

#### EXCEPTION 2.

A judgment in an action of ejectment, is conclusive evidence of the plaintiff's title, as far back as the time of the demise stated in the declaration, in an action for *mesne profits*. *(g)* And a judgment is equally evidence, where the parties are really, though not nominally the same in both suits; as where one suit is in favour of a party beneficially interested, and the other in favour of his trustee. *(h)*

*(d)* Vide Phil. Ev. 1 Am. ed. 199, 200, & cases there cited.

*(e)* 15 John. 286.

*(f)* Vide Phil. Ev. 2d Am. ed. 222 to 226, & cases there cited.

*(g)* 2 Burr. 668. 11 John. 405.

*(h)* 4 Dall. 120.

## EXCEPTION 3.

A verdict or judgment is evidence against all such, as claim under the parties to the suit. Thus, if I sue upon a promissory negotiable note, and am defeated upon evidence of payment, and afterwards sell the note to A, the judgment against me is conclusive against A. So, if one recover against me in an action of detinue for a cow, and I afterwards sell the cow to A, the recovery is conclusive against him, for, in both cases, he claims under me.

Again :—I am sued in trespass or trover for a chattel, which I bought of A, who is bound to warrant the title, and I give A notice of the action, and a judgment goes against me; that judgment is conclusive against A, as to the title, in an action against him, upon the warranty. So, if A is to indemnify me, against a particular claim, and a suit is commenced against me upon which I give A notice, and a judgment is had; this is conclusive against A, as to the amount of damages in an action for indemnity. And so, in like cases. And for this doctrine more at large, as to the admissibility of verdicts and judgments, with regard both to the parties and subject matter, vide Philip's Ev. 2d Am. ed. 226 to 230, and the cases there cited.

## RULE VIII.

A verdict or judgment in a criminal suit, in behalf of the people, is not evidence on the same matter coming directly in question in a civil cause, (i) if the party wishing to avail himself of such evidence in the civil cause, was a witness for the criminal prosecution. (j) If he were not such witness, the verdict or judgment would be, *prima facie*, evidence. (k)

## RULE IX.

The judgment of a court of exclusive jurisdiction, directly upon the point, is conclusive between the same parties, upon the same matter coming incidentally in question, in another court, for a different purpose. (l)

Thus, the probate of a will, by the surrogate, is conclusive evidence, in civil cases, of the validity of the will. (m) And a

(i) Vide Phil. Ev. 2d Am. ed. 231, 2.

(j) 18 John. 352.

(k) *id.*

(l) Vide Phil. Ev. 2d Am. ed. 341, & cases there cited.

(m) 3 T. R. 125.

condemnation of goods, ships, &c. in a court of admiralty, in a proceeding against the thing itself condemned, is, in general, conclusive evidence against all the world, as to the matter in question, upon which the condemnation was founded, whether such court be foreign, or domestick.(n)

But, what is most material to the court of whose proceedings we are speaking, a conviction for any offence, by a justice of the peace, having competent jurisdiction, is, till reversed, or quashed, conclusive evidence in his favour, in an action for any proceeding under the conviction. Thus, a conviction of having returned to a parish, after being removed, by an order of two justices,(o) a conviction under the 2d section of the act, to prevent forcible entries and detainers,(p) a conviction, and it seems merely the warrant of commitment for a contempt, are conclusive evidence of the facts therein contained.(q)—And so in all the innumerable cases of conviction before a magistrate; and they are not bound to show the regularity of the conviction; and even though it be informal yet, if the magistrate have jurisdiction, it will protect him.(r)

It is a general rule, with respect to special and limited jurisdictions, that where a person acts as judge, within his jurisdiction, he will not be liable to have his judgment examined, in any action brought against him.(s) Hence, the facts upon which the conviction is founded, cannot be traversed.(t)

The validity, and conclusiveness of all proceedings before justices, and other inferior tribunals, may always be questioned by showing that they had no jurisdiction of the subject matter.(u) Thus, should a justice try an assault and battery, slander, malicious prosecution, &c. his judgment would be no protection to him, or any other person acting under his process, for all his proceedings are merely void.(v)

So, where a suit was discontinued, by the plaintiff's not appearing, and the justice afterwards gave judgment against the defendant, without issuing process, or any notice being given, and without the defendant's appearing, it was holden that this

(n) Vide Phil. Ev. 2d Am. ed. 248 to 251, & cases there cited.

(o) 7 T. R. 633. 12 East, 75. 16 East, 21. 1 N. R. L. 114. Ante, 550, 51.

(p) 8 John. 44. 1 N. R. L. 96.

(q) 2 Bay, 1. Ante, 550, 51.

(r) 12 East, 67. 16 East, 13.

(s) Phil. Ev. 2d Am. ed. 261, 2, & cases there cited.

(t) 1 Ld. Raym. 467.

(u) Willes' Rep. 36. n. (a) 14 John. 432. 15 id. 493, & vide ante, 216 to 218.

(v) 14 John. 432. 15 id. 493. Ante, 216 to 218.

judgment was void, and might be impeached, even in an action of debt on the judgment before another justice. (w)

In all cases, too, where a judgment is fraudulently and collusively obtained, it may be impeached, and avoided for that cause, be it rendered in a court of the highest or lowest jurisdiction. (x) And this is one ground taken by Mr. Justice Platt, in the case of *Hubbard v. Spencer*, above cited from 15 John. 244, viz. *collusion*, between the justice and the one who confessed the judgment.

The sentence of any foreign court, of competent jurisdiction, directly deciding a question, which was properly cognizable by the law of the country, seems to be conclusive here, if the same question arise incidently between the same parties in this country. And on its coming directly in question, it is, *prima facie*, evidence. And the judgment of a court in a neighbouring state, having jurisdiction of the subject matter, and in which the defendant has been duly notified to appear, is conclusive in the courts of this state, whether it come directly or collaterally in question here. (y)

### SECTION III.

#### OF PAROL EVIDENCE TO EXPLAIN OR CONTRADICT WRITTEN TESTIMONY.

Of parol evidence, in order to explain written testimony, the law is very sparing in its admission, even with regard to private writings. And, as the decisions on this subject, relate principally to wills, and hence can rarely come in question before a justice, I shall be very brief in considering them. The following, so far as a justice's court is concerned, seems to be the result of them: If an agreement in writing, be of doubtful, or uncertain import, upon the face of it, which is called a *patent ambiguity*, no parol evidence can be admitted to explain it. It is the duty of a court of justice, to make something out of it, and give it effect and consistency as a contract, provided this can be done, upon a consideration of all its parts. If,

(w) 15 John. 244.

(x) 11 State tr. 262, 3 Rep. 78:

(y) Vide Phil. Ev. 2d Am. ed.

252 to 154, & cases there cited.



however, this is impossible, it must be rejected as void ; for it cannot be bolstered up by the explanation of witnesses.

But it is different where the contract appears to be certain upon the face of it ; and the difficulty arises from some extrinsic matter, called a *latent ambiguity*. As where there are several persons or things, which will answer to the description of the persons, or subject matter of the agreement. Thus, if *James Jackson* agree, in writing, to sell his horse, to *John Doe*, and there be two or more persons, of that name, parol evidence may be given to show which was intended by *Jackson*. So, if *Jackson* sell *Doe* his black horse, and he have two black horses, parol evidence may be given to show which was intended, and so in the like instances. The doctrine, at large, on the subject of *latent* and *patent ambiguities*, may be found in *Philips' Ev.* 410 to 423, 2d Am. edition, and the cases there cited ; but they have a very rare application to any proceeding before a justice.

You cannot give parol evidence, to contradict a written contract of any kind ; as to vary the provisions of a deed, the condition of a bond, (z) or the time of paying a promissory note, &c. (a) But you may show another writing executed at the same time, to defeat or vary the written contract, of equal degree with the first ; for these will be deemed parts of the same intire contract. (b) And you can show by parol, when a written contract was delivered, if this become material ; for, from that time, it takes effect ; and so, you can show any agreement between the parties, by parol, varying the time of payment or other terms of the contract, even in case of a deed or promissory note, as between the immediate parties thereto, though not so as to affect an innocent indorsee, in the fair course of trade. But it is conceived that such subsequent agreement must be upon some new consideration, or otherwise it will not bind. And so, where a writing is expressed to be upon *divers considerations*, or *for value received*, or the like, you can show what the consideration in fact was, if this become material. When it is said, that a written contract cannot be contradicted, it must be understood as applying to the parties themselves, to the contract, or those claiming under them ; for whenever it becomes material for any other person, who is to inquire into any part of its provisions, he may show the truth of the case in all respects, by parol, or other proper evidence, even though it contradict every part of the written contract. Thus, if he wish to make it out a conveyance in fraud of cred-

(z) 18 John. 45.

(b) 18 John. 45.

(a) 3 Campb. Rep. 57. Skin.  
Rep. 54.

itors and so on ; or to show that a bill of sale between other parties, though absolute in its terms, was intended as a mortgage ; this may be done, where the inquiry becomes material. (c) And we have seen, (d) that a receipt, or other written acknowledgment, or memorandum, between the parties, is not a contract within the above rules, and therefore may be contradicted by parol evidence, even as between the parties themselves.

This doctrine, as to the contradiction of written evidence by parol, may be found at large, in Philips' Ev. 2d Am. ed. 423 to 448, and the cases there cited.



#### SECTION IV.

#### HOW FAR BOOKS OF ACCOUNT ARE EVIDENCE, IN FAVOUR OF THE PARTY KEEPING THEM.

The cause, in which the admissibility of a party's books, as evidence in his favour, was established, and restricted, originated in a justice's court, where this species of evidence is much oftener introduced, than before any other tribunal. *Thayer* sued *Vosburgh*, before a justice, for butcher's meat, furnished by him to *Vosburgh*, and his family. *Thayer* proved, 1st, that he had been in the daily practice of supplying *Vosburgh*, and his family with meat, during the period for which he claimed payment. 2d. He proved by some of those who had dealt with him, that he kept just and honest accounts. 3d. That he had no clerk. He then offered his books of account in evidence. They were objected to, but admitted by the justice, who gave judgment for *Thayer*. *Vosburgh* removed the cause by certiorari, into the Supreme Court, (e) where the judgment was affirmed, and the following restrictions laid down, within which all account books, without regard to the particular employment of the party keeping them, are made evidence in his favour.

1. The charges to be proved, must be such as are matter of book account. A book, therefore, would not be evidence of

(c) 18 John. 173, per Platt, J.  
(d) Ante, 577.

(e) 12 John. 462.

money lent, had and received or paid, laid out, and expended, for the use of the opposite party.

2. They are not evidence of a single charge ; because there exists, in such case, no regular dealing between the parties.

3. They are not to be admitted, where there are several charges, unless a foundation is first laid for their admission by proving,

1. *That the party had no clerk.*

2. *That some of the articles charged, had been delivered.*

3. *That the books produced, are the account books of the party.*

4. *He must prove, by those who have dealt, and settled with him, that he keeps fair and honest accounts.*

*Under these restrictions, they are evidence, to be left to the jury.*

Platt, J. dissented, and concludes a very able opinion, with these remarks : " The rule, as now proposed to be modified, is very complicated, and difficult in its application ; and, therefore, extremely liable to be misapplied and perverted, especially in justice's courts, where, according to the established rules, in regard to setting aside verdicts, infinite frauds, and oppression, may be screened, by the latitudinarian powers of juries, in the application of such a complex rule. The case would seldom, indeed, occur, where this court could, on justifiable grounds, control the verdict of a jury, upon the point now under consideration. I think, therefore, the judgment of the court below ought to be reversed."

By the above decision, account books are made evidence for the consideration of a jury, or which is the same thing, the justice, where no jury is called for by either party. But the weight of such evidence, in the scales of justice, is not, and could not be assigned, and must, therefore, depend for its credit, when introduced, upon various circumstances, calculated to increase or diminish its force, in the view of enlightened experience. The above remarks of his honour Judge Platt, are sufficient to inculcate extreme caution, in the application of the rule laid down by a majority of the Supreme Court.

And I cannot enlarge upon this topic, more usefully, than by introducing the remarks of Chief Justice Pennington, in his

excellent treatise upon the justice's court of New-Jersey, (f) upon a similar rule, which prevails in the courts of that state. " Books of account, are very frequently produced in evidence. The manner, that books are kept in the country, renders them, in many instances, very unsatisfactory evidence, and makes it necessary to examine them with caution. They are admitted from the necessity of the thing, in derogation of an ancient principle of the common law, that a party ought not to be permitted to furnish evidence for himself. The constant, continued, and repeated dealings, and daily intercourses of a commercial or pecuniary nature, which one citizen hath with another, especially as the country approximates to a manufacturing and commercial state, renders it next to impossible, to call witnesses to every transaction of the kind, and very laborous and inconvenient to reduce to writing, under the hand of the party, every contract which our wants, and interests are hourly leading us to engage in. This hath given rise to the practice of memorandums, in the form of books ; if these memorandums are to have no effect, it would be a useless waste of time to keep them. These memorandums, or books of accounts, are, by the general assent of the community, received as evidence of the transaction written in them ; and have, at length, received the sanction of our highest courts of justice. Being, however, the acts of the party producing them, and made by himself, for the purposes of evidence, they are so far from being conclusive evidence, that they are liable to the strictest scrutiny, and, at most, presumptive evidence ; and as such, like all other presumptive evidence, liable to be rebutted or counteracted by every kind of evidence, that can be raised against them. There is one essential requisite to the introduction of these books, which is, that the party offering them in evidence, must first prove that the book he offers, is his book of account, in which he usually enters, and keeps his general accounts with those persons with whom he deals ; for, if a man was to keep one book for one man's account, and another book for another, these books would not be such account books as he would be entitled to give in evidence ; besides, it is essential, that the books offered, are made to appear to be the actual books of the person offering them, and not the books of any other person ; also, that it is not a book made up for the occasion, but a book in which the person offering it, keeps the account of his ordinary dealings, and a book of original entry.— Books of accounts, derive much of their credit from the manner in which they are, or ought to be kept, that is, that they are a kind of diary, or daily journal of the transactions of the persons who keep them, who enter every sale, or other act,

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(f) Penn. on small causes, 153.



as it occurs. Books kept in this way, are entitled to the more credit, from two causes ; first, that a memorandum made of a transaction at the time that it took place, is more likely to be correct, than if it is entered from memory some time afterwards ; second, men are more likely to be tempted to make false entries in their books, a long time after the transaction hath happened, and, frequently, after a difference hath taken place, than at the time and place of the original transaction.—Some persons keep their books in this way ;—They have but one book, and that in the nature of a ledger, wherein they open on one page, one man's account, and on another page, another man's account, and keep no day book at all. Books kept in this way, open the door for the grossest frauds and injustice ; and the most scandalous iniquity is daily practiced under it.—I am clearly of opinion myself, that books kept in this way, ought never to be suffered to appear in a court of justice.—But the law is otherwise, and they must be admitted, the same as other books, when proved to be the ordinary books of account of the person offering them, in which he makes his original entries.(g) But they ought to be considered the most suspicious testimony, which can be offered, little better than the declarations of the party, in his own favour. (Vide 2 Mass. Rep. 217, &c.) Entries are frequently made after the controversy commences, and accounts opened years after the transactions have taken place, which gave rise to them. And I would here observe, that because the law permits books of account to be given in evidence, that is, shown to a court and jury, it by no means gives a validity or authority to the contents of them ; but the justice, or the jury, in case the trial is by jury, must draw their own conclusions. The character of the man who keeps the books, the fairness or unfairness of the books from their appearance, the time and manner of making the entries ; whether the items are in the ordinary course of a man's trade or business, or of an extraneous, and suspicious nature ; whether any, and what other evidence is given to corroborate the charges ; all these are proper subjects, for the due consideration of the justice or jury." (And vide 4 Mass. Rep. 455.)

A book of account ought not to be received in evidence, where no price is fixed to the items charged. (1 Southard's Rep. 370.) And it ought to contain the first entries or charges by the party, made at or near the time of the transaction to be proved; and when the contrary is discernible from the face of the book, or comes out in evidence, they ought to be reject-

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(g) Vide 13 Mass. Rep. 427. 2 id. 217.

ed. (2 Mass. Rep. 217.) Fraudulent appearances or circumstances, such as gross and material alterations, false additions, &c. are also objections to the competency of the book in which they are discoverable, or against which they maybe proved in any manner. (id.)



## SECTION V.

### OF THE INCOMPETENCY OF WITNESSES.

This arises, 1st, for want of understanding ; 2d, from defect of religious principle ; 3d, from infamy of character ; 4th, from interest ; 5th, from the relation of attorney, solicitor, or counsel, and client. This question of *competency*, belongs exclusively to the justice ; as the question of *credibility* does to the jury, (or justice setting in their stead) after the witness is sworn. If the witness is *incompetent*, he cannot be sworn ; if he is *incredible*, he is not to be believed when sworn.

In addition to the heads of incompetency above mentioned, it is proper to notice, that a slave is an incompetent witness, in a civil suit : (h) but this does not preclude a free black from swearing to facts which took place while he was a slave ; (i) and where he is manumitted by an infant, who has power to revoke the manumission on coming of age, yet this is only an objection to his credit, but not to his competency. (j)

1. Persons insane, idiots and lunatics, under the influence of their malady, are incompetent, though, if they enjoy lucid intervals, they may testify during such interval, if they appear to have sufficient reason. Even a person born deaf and dumb, may, if he appear to have sufficient understanding, give evidence through an interpreter by signs. (k)

Children, who do not understand the moral obligation of an oath, cannot be examined. But if they do understand such obligation, they may be sworn at any age. If capable of distinguishing between good and evil, they may generally be sworn ; and if the child appear to have good sense, but not to understand his duty when sworn, he may be instructed by the justice, or some judicious person appointed by him. This may be

(h) 2 N. R. L. 297, s. 19. 4 Dall.  
145. n. (1)

(i) 1 John. 503.

(j) 10 id. 132.

(k) Vide Phil. Ev. 2 Am. ed. 14,  
& cases there cited. 16 John. 143.

done on the spot, and in the mean time, the trial may be suspended. Such evidence must always, however, be upon oath.(l)

Witnesses may be examined as to the competency of a lunatic, &c.(m) though the usual and most satisfactory mode is, by the inspection and examination of the witness himself. And where the justice, from this mode of examination, is satisfied that the witness is intoxicated, he should not be permitted to testify, it being a temporary privation of reason.(n)

2. Every person who believes in a God, and a future state of rewards and punishments, may be sworn as a witness, although he do not believe in the truth of the gospels. Thus, a *Jew*, *Mahometan*, *Gentoo*, or infidel of any country, may be a witness, and they are to be sworn according to the form which they think the most binding, and, accordingly, a *Jew* may be sworn on the *Penteteuch*, or a *Mahometan* on the *Koran*, &c. But atheists, and such infidels as profess not any religion, natural or revealed, that can bind their consciences to speak the truth, are excluded from being witnesses; but the proper question to put to a witness is, whether he believes in a God, and a future state of rewards and punishments.(o)

It has been decided in Massachusetts, that although a witness disbelieves in a future state of existence, yet he is competent, and the question goes only to his credibility.(p) But the direct contrary has been recently decided in this state; and if an adult has recently declared such belief, in a deliberate manner, this will exclude him, though it is competent to show that he has conscientiously changed such belief, and thereby restore his competency. But he cannot be called upon at the trial to recant his former opinion, or deny the declarations proved against him; nor is he at all to be questioned as to his religious creed, when he is objected to as an infidel. When an infant is examined on this subject, it is with the view to test their capacity and determine their understanding of the nature and obligation of an oath.(q)

By our statute, sess. 36, ch. 13, s. 15, 1 N. R. L. 386, any person having conscientious scruples about laying his right hand on, and kissing the gospels, may be sworn by raising his right hand, and swearing by the ever living God. And by the next section, if either of the above modes be conscientiously objec-

(l) Vide Phil. Ev. 2 Am. ed. 14, 15, & cases there cited

(m) 10 John. 362.

(n) 16 id. 143.

(o) Vide Phil. Ev. 2d Am. ed. 16 to 20.

(p) 15 Mass. Rep. 184.

(q) 18 John. 98. Vide 4 Day, 51.

tionable to him, he may make his solemn affirmation, which is the usual mode in which quakers give their evidence.

The mode, in which the witness is sworn, is to be gathered from him on his own suggestion, or on his examination before swearing him.

3. Where a person is indicted, found guilty, and judgment rendered against him for treason or felony, or any species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, barratry, or other the like offences, which necessarily imply falsehood; or for a conspiracy to accuse another of a crime, bribing a witness to absent himself, and not give evidence, or winning in certain games by fraud, where the statute declares, that the criminal shall be deemed infamous, in all these cases, he is an incompetent witness; but the prosecution must have actually gone to judgment, and the incompetency of the witness cannot be established, without proof of the record of conviction in due form, as mentioned ante, 561, 2. And with regard to convictions in the Courts of Oyer and Terminer and General Sessions, if the record be lost, the next best evidence (and which shall be presumed to exist) (r) is the transcript thereof required by statute, 1 N. R. L. 275, to be filed in the Exchequer. It is not the kind of punishment, but the nature of the crime, which affects the competency of the witness.

This disability of the witness, (except on a conviction of perjury, for subornation of perjury, under the statute,) (s) is removed by a pardon, which must be proved by a production of the pardon itself, under the great seal, and if the pardon be a conditional one, it must be shown, that the condition has been performed. For the doctrine more at large, under this last head of incompetency for infamy, vide Philip's Ev. 2d. Am. ed. 22 to 28, and the cases there cited.

Nearly of kin to the principle I have just been considering, is that which precludes a party to a negotiable instrument, as the indorser, payee, maker, &c. of a bill or note, from being a witness to prove it void in its creation; as that it was given on an usurious, gaming, fraudulent, or other consideration, which would destroy its validity. (t) But any fact subsequent to the creation of the instrument, (i. e. its delivery and going into operation,) by which it is discharged, or tending to its discharge, may be proved by a party thereto, if he be otherwise disinter-

(r) 14 John. 182.

(s) 1 N. R. L. 171.

(t) Vide Phil. Ev. 2d Am. ed. 33,

n. (b) where all the cases to this point are cited.



ested between the parties litigant ; as that it has been altered, paid, indorsed, when over due, that the indorsement was merely in trust for the payee, or that an accommodation note had been converted by a party to whom it was delivered to be discounted. So, that the agreement to accept was conditional.(u) But an indorser cannot be a witness to prove usury in the transfer, in a suit against the maker,(v) though a second indorsee may be a witness to prove, that a third indorser had said that he had received and discounted the note, on an usurious contract or consideration.(w)

4. The head of interest is the most extensive in its operation to exclude witnesses, and the most difficult in its application for that purpose, perhaps of any in the whole doctrine of evidence. The true rule is, *that when a witness is interested in the event of the suit, to swear in favour of the party who calls him, he is incompetent* : that is to say, if the witness is called to swear a judgment into existence, which would be evidence for him, or to swear down a judgment which would be evidence against him, in any future action to be brought, or which might be brought, for or against him, or, if he will directly gain or lose by the event of the suit, he is an incompetent witness, otherwise not.(x) These are always the true and only points of inquiry.

It is no objection to the competency of a witness, that he may feel a strong bias upon his mind, from being a relation of the party, however near ; nor is it an objection, that he has an interest in the question, that is, having, or being likely to have a suit turning on the same point, with the one in which he is sworn, or expecting some benefit from the result of the trial, or by standing in the same situation with the party, being a joint trespasser or wrongdoer, and therefore liable, or even subjected to a separate action for the same wrong ; or, that he has a like demand with the party calling him, against the defendant, for wages or other thing, or being separately liable on the same contract, or it being likely that the verdict in the cause in which he testifies, may reach the ears of another court or jury, and influence their decision ; and so, the witness who borrowed the money, may be a witness in an action *qui tam*. for the usury,(y) whether he has repaid the money or not. So a witness is competent to prove acts which he has done under a bare authority, although he may feel an interest to make them seem regular. Indeed, all servants, agents, attorneys, guardians, and other trustees, are none of them incompetent witnesses, as to the subject

(u) id.  
(v) 10 Mass. Rep. 502.  
(w) 17 John. 176.

(x) Vide 14 John. 81.  
(y) Vide ante, 344, 5.

of their trust or agency, merely on the ground that they may possibly be liable to an action for what they have done.

In all these, and other cases, the mere circumstance that the witness thinks himself interested, ought not to exclude him, but the justice should inquire into the nature of the interest, and unless he finds it to be such as the law recognizes, whatever the opinion of the witness may be, he should be sworn, and his situation be left to be taken into account, in estimating his credibility. (z) Even an honorary obligation will not disqualify a witness. (a) But where a witness conceives himself to be legally interested, and that impression cannot be removed by explanation, the current of authority in this country seems to be in favour of his exclusion, even though he have no real interest. (b)

One of the parties may be examined as a witness by consent ; (c) and a master may be a witness, in an action for the trespass, or other injury done by his servant, although the master himself be liable for the same injury ; (d) and a man liable to be rated, may be a witness against a defendant in an action to recover money, in behalf of the town. (e)

Having now noticed the cases where this rule of interest does not apply, let us take the case, where the judgment in favour of the party calling the witness, may be used in an action afterwards brought by or against him, either to establish some claim in his favour, or to defeat some claim against him.

1. Where it would be evidence for him. The case usually put to illustrate this part of the rule, is, where all the inhabitants of such a town, village, island, or other particular place, claim a customary right of common, either for the pasture of their cattle, or of fishing, &c. in a certain place, which is to be proved by immemorial usage. In such case, a verdict and judgment for one of the inhabitants, who claim this common right, in a suit where such right is in question, would be evidence to support the custom in favour of another. Now suppose one of the inhabitants is sued in trespass, for availing himself of this right of common, and he pleads the prescription as a justification, none of his co-claimants could be witnesses to sustain the plea. But this is not because his feelings may be friendly to a support of the plea, nor because he stands in the place of the

(z) Vide Phil. Ev. 2d Am. ed. p. 34 to 43, & cases there cited.

(a) id. 42, 3. 9 John. 220, per Cur.

(b) Vide Phil. Ev. 2d Am. ed. note (a) p. 42.

(c) 13 John. 517.

(d) Doug. 449. 3 East, 346, 366.

14 John. 79.

(e) 4 John. 426.

defendant, and has an interest in the question, but because the verdict and judgment in favour of the defendant, would, in an action against the witness, for the exercise of the same right, at the suit of the same plaintiff, be evidence of the custom.— This question, to be sure, concerning a prescriptive right to a common, which is real estate, (f) could not be decided by a justice's court, but it is, nevertheless, a very good example, to show the meaning, and aid in applying the rule. (g)

Again—I pay you money, to be paid over to A, for a debt which I owe to A. In a suit brought by A, against you for the money, he cannot make me a witness against you, because, should he succeed against you, and collect the money, the judgment and proceedings would be evidence in my favour, in an action afterwards brought by A against me for the debt in question, so that I should have a direct interest. (h) And a person selling goods under a *del credere* commission, (i) is not a competent witness for his principal, in an action for the price of the goods so sold; for the judgment, &c. would be evidence in his favour, to prove his commission in an action for it against his principal. (j) In an action in favour of an executor or administrator, the next of kin, or other person interested, to increase the fund, is an incompetent witness; because such a recovery would be evidence to swell his claim against the plaintiff, on a bill filed, or other proceeding for an account. (k) And the same principle would exclude the creditor of an insolvent debtor, or the insolvent himself, in an action by his assignees. (l) Indeed, it is a general rule of evidence, that if the effect of a witness's testimony will be to create, or increase a fund, in which he will be entitled to participate, he will be incompetent. (m) And, within this principle, if I have an order from the plaintiff, to pay me money out of a judgment when recovered, whether he has accepted the order or not, I am an incompetent witness in the support of the recovery. (n)

2. Where the verdict or finding of the justice would be evidence against the witness, should it be adverse to the party calling him.

Various cases of this kind, must have occurred to the mind of almost every man, who has had the least concern with business. Where the witness has agreed to indemnify the party

(f) 2 John. 185. Ante, 493, 4.

(g) 1 T. R. 302. 3 id. 32, 2 John.

170.

(h) 4 Binney, 80.

(i) Vide ante, 44, 5.

(j) 11 Mass. Rep. 60.

(k) 1 Mass. Rep. 239.

(l) 5 John. 427.

(m) id. 258. 2 Dall. 50. 1 Mass. Rep. 239. 2 Day, 466. 2 Munf. 452.

(n) 1 Caines, 364.

calling him, against the event of the suit, or the costs of the suit, (o) or is a partner, joint debtor, or surety, in the matter in question, or the drawer of a bill, or the indorser of a note, and is called as a witness in an action by the holder, in all these cases, his interest is obvious. And so, in an action against a master, for the negligence of his servant, the latter cannot be a witness to disprove his negligence, for he is answerable over to his master, and the verdict, &c. against his master will be conclusive of the amount of damages, in an action by the master against him. (p)

The bail or security, either for the plaintiff or defendant in the cause, as for a non-resident to procure a warrant, or for the defendant on his adjourning, &c. is not a competent witness for his principal. And in an action against a sheriff for a false return, his deputy is inadmissible to prove that he attempted to make an arrest. Upon the same principle, the *prochein amy*, or guardian, for an infant plaintiff would be incompetent, though it would be otherwise of a guardian for the defendant. (q) In an action of trover, trespass, &c. for a chattel against the vendee, the vendor cannot be a witness, for there is against him an implied warranty of title. (r) And so, of the vendor of a note or other negotiable instrument, even though the vendee take it at his own risque; for the law would still imply a warranty, that it was not forged. (s)

The question, whether the verdict or proceeding in the cause, will be evidence for or against the witness, is not the only test, though some judges have considered it so. (t) Other cases of disqualification are, however, but few and insulated, and I shall content myself with illustrating this exception by the following :

Where A sues a constable for taking his goods on an execution, against B, the latter cannot be a witness for the constable; because, if the latter succeed, the sale of the goods will go to discharge B's debt. (u) And so, in an action against one joint owner of a ship for repairs, another joint owner is inadmissible to prove the defendant one of the owners, because he thereby makes him share a part of the liability for the repairs, and gets rid of so much for himself. (v) Nor, upon the same principle, is one partner a witness to prove that the defendant is also a partner. (w)

(o) 11 John. 57.

(p) Vide cases cited Phil. Ev. 2d Am. ed. 44.

(q) Vide ante, 295, & 299.

(r) & vide cases cited Phil. Ev. 2d Am. ed. 48, 9.

(s) 15 John. 240. 16 id. 201.

(t) Phil. Ev. 2d Am. ed. 48.

(u) 5 Bos. & Pul. 331.

(v) 16 John. 89.

(w) 2 Dessau. Eq. Rep. 4, 5.



Under this rule as to interest, the witness is inadmissible, be the interest never so small in amount.(x)

If the witness has an interest, inclining him to each party alike, he is a competent witness for either.(y) Thus, where I receive money of you, to pay a debt to A, and A afterwards sues you for it: you insist that I am the agent of A, to receive the money, and that therefore, A is satisfied by the payment to me; which A denies: I am a competent witness to prove the agency; because, if I *was* agent, I am liable for the money to A, and if I was not, I am liable back to you, so that I am indifferent.(z) So, where a captain of a ship borrowed money of A, for the use of the owners of the ship, as A insisted, but the owners denied it: In an action against the owners, the captain may be sworn, to prove on what account the money was borrowed; being liable to the plaintiff, if borrowed on his own account, and to the ship owners, if on theirs.(a) And where you and I are partners, and I, owing to A a separate debt of my own, draw a bill upon B, in your name and mine, in favour of A, for the debt, and B accepts the bill: In an action on the bill by A, against B, either you or I are competent witnesses for either party; for if A recovers against B, though you and I must make the bill good to B, yet you have your remedy over against me, and if A recovers, I am liable to account to B, and if not, I must pay the amount to A; so that we are both indifferent between the parties.(b)

Again—I hold a note against you, and indorse it to A; and afterwards, you hand me the money to take it up. A sues you upon the note; I am a competent witness to prove, that I paid the money over to A; for, if the plaintiff fails, he can sue me: if he succeeds, I am liable to you for the money, as for so much received to your use, and, although I am also liable to you for the costs of the action, brought by A, yet that was held not to turn the scale.(c)

I hold a note against you, and indorse it to A; on a suit brought by A, against you, you release me, and offer me as a witness, to prove that my indorsement was merely to A, as my agent to collect the money for my use: It was decided upon such a state of facts, that I could not be a witness; because, if I thus could swear the note back into my hands, it would be more to my convenience, and consequently, to my interest, than to wait the event of a suit against A, after a recovery by him, although my interest here would be balanced in every other respect, except

(x) 11 John. 57.

(y) 16 John. Rep. 89.

(z) 7 T. R. 476.

(a) id. 477. n.

(b) 13 East, 175.

(c) 2 East, 458.

in the difference of the remedy. *(d)* And the case of *Owen v. Mann*, 3 Day, 399. was decided upon the same principle. Yet Mr Philips thinks, that at this day, in England, such is not the law, but that our consideration should be confined to the broad ground of interest, without regard to the remedy, which is, to be sure, a much more certain rule, and still leaves the consideration of difficulty to operate upon the credit of the witness.—*(Phil. Ev. 2d Am. ed. 55.)*

In an action by the holder, against the indorser of a promissory note, the maker is indifferent, and may be a witness for either party, being at all events, liable to the losing party. *(e)* And in an action by the holder, against the maker, the indorsee is a witness for the maker, to show payment of the note. *(f)*

Again—A constable has an execution against you, and takes your goods on it; another constable takes them from the first, on another execution against you, or your landlord distrains them for rent; you are an indifferent witness between the contending claimants of your goods *(g)* A witness incompetent on the ground of interest, cannot be examined at all; and although his interest relate to a single point in the cause, he cannot be examined as to any other point. *(h)* It follows, from the rule itself, that the interest which excludes a witness must be such as inclines him in favour of the party calling him; for an interest against that party, makes him the best possible witness. *(i)*—Thus, the party escaping from execution, may be a witness for the constable in an action against him for the escape, because, if a recovery be had against the constable, it exonerates the party, and his interest is, therefore, against the constable. *(14 John. 362.)*

From what has been said, it follows that no party can be a witness in his own behalf, except by consent, save in regard to certain preliminary matters, mentioned ante, p. 571. This rule, as it respects being sworn generally in a cause, is almost without exception; for it is impossible to conceive of many cases before a justice, in which a party would not be interested; *(j)* nor is a party ever compellable to witness against himself; there are, however, a few exceptions. In an action against several defendants, for a wrong, where one suffers judgment by default, it is said in England he may be a witness for his co-

*(d)* 5 T. R. 578.

*(e)* 16 John. Rep. 70. 14 Mass. T. R. 303. contra.

*(f)* 11 John. Rep. 128.

*(g)* *id.* 183. Vide also, as to this doctrine, 17 John. 133.

*(h)* 4 John. Rep. 293.

*(i)* 1 John. 159.

*(j)* Penn. on small causes, 151.

defendant, he not being liable to the costs of the issue tried against the other ; and he is not released, whatever may be the event of that issue. *(i)* But the plaintiff cannot make him a witness in such case ; *(j)* and this rule has never prevailed with regard to a contract. *(k)* Suppose then, you and I are sued before a justice, in trover, for taking and converting a chattel : I plead to issue ; your merely suffering a judgment by default would not bring you within the English cases, as a competent witness ; because, in a justice's court, notwithstanding your default, the court must proceed to your trial, the same as though you had appeared and pleaded : *(l)* Whereas, in England, and so with the courts of record in this state, a default confesses the wrong. But should you appear and confess the wrong, generally, and leave the damages to be assessed against us both, I do not see why, within the English cases, you are not then a witness, for me. For, in such case, justice would dictate, that the costs of trying the issue against me, should not fall upon you ; and your evidence for me, is rather throwing the damages on to your own shoulders : Wherefore, you are, of the two, interested to swear against me. And although joint damages may be assessed against us, *(m)* yet this does not necessarily follow ; and in estimating the damages against you, the court or jury are intirely to disregard the evidence which you give.

So, where you have sued several defendants, for a wrong, one or more of which you wish for witnesses, on motion, the justice may strike out and discharge them, and you may then have them sworn. *(n)* And so, if among several defendants sued for a wrong, there be against some of them, no manner of evidence, they may be examined as witnesses for the other defendants. *(o)* and in order to this, the court should discharge them on the trial. And so where several trespassers, or wrong doers, are sued, and only part served with process, or brought into court, and the plaintiff declares against those brought in, as having committed the trespass, together with the others, those not served may be witnesses for the others. (Vide 2 Esp. N. P. Am. ed. 263, and cases there cited.)

The wife can never be a witness for or against the husband, who is a party in the cause, and wherever the husband would be incompetent on the ground of interest, the wife would be equally so. *(p)* But the acts of the wife, with the authority and consent of the husband, are evidence against him, the

*(i)* 2 Esp. N. P. C. 552.

*(j)* 2 Campb. Rep. 333.

*(k)* Phil. Ev. 62.

*(l)* 10 John. 106.

*(m)* 6 Binney, 319. 1 Day, 33.

*(n)* 1 Sid. 441. Bull. N. P. 285.

*(o)* Bull. N. P. 285. 15 John. Rep. 323.

*(p)* Vide Phil. Ev. 2d Am. ed. p. 63 to 72, & cases there cited.

same as those of any other agent. (q) And her representations are, in this respect, admitted against him, on the same footing as those of any other agent. (r)

We have already seen, (s) that servants, &c. may be witnesses for the principals. And it is the constant practice, from necessity, and for the sake of trade, and the common usage of business, to admit agents to be witnesses for their principals, in order to prove contracts made by them, on the part and behalf of their principals, even though they are to receive a poundage on the amount of a sale, or what they have bargained for, beyond a stated sum; and every person who makes a contract, or does business for another, is an agent within the meaning of this rule. So servants and agents may prove the payment or receipt of money, or the delivery of goods, in behalf of their master or principal. And where they have paid money, or delivered goods by mistake, they are competent witnesses, in an action to recover for such money or goods. But where a person has entered into a contract in his own name or right, he is not competent to swear, that it was in behalf of another, as his agent. The above are exceptions to the rule, which excludes witnesses on account of interest; for it is obvious, that in many of the cases just mentioned, an interest does exist. But where the act of the servant is a mere breach of duty, he is not a witness; as if my servant should squander my money in gaming, he is not a witness for me to recover it back. (t)



## SECTION VI.

### OF THE MEANS BY WHICH THE COMPETENCY OF AN INTERESTED WITNESS MAY BE RESTORED.

The objection to a witness, may be proved 1, on his own *voir dire*, that is, on his own oath, to speak the truth, touching his interest.

(q) *id.* 68.

(r) *id.* & vide ante, 577, & vide 2 Starkie, 204, 1 Holt's N. P. Rep. 591. S. C.

(s) Ante, 591.

(t) Vide Phil. Ev. 2d Am. ed. 94, 5, & the cases there cited.



*Form of the voir dire.*

You shall true answers make, to such questions as shall be put to you, touching your interest in the event of this cause. So help you God.

1. On this oath, the witness must answer as to all, or any of the facts, material to the question of interest, even though they relate to records, deeds, or other writings, though they be absent, and not produced, and he may speak of their contents, and give such explanations as are required of him, without their production; for the rule requiring the best testimony, which the nature of the case admits of, does not apply to an examination on the *voir dire*. And should his interest be once established, the same latitude of examination is allowed, as to any matters, by which such interest is done away. Thus, he may swear to a release of his interest, without producing the instrument.(u)

2. You may show the interest of the witness, by other testimony, either parol or written; and in this case, when once the interest of the witness is established, strict proof is required of its discharge, or termination; and here the rule requiring the best testimony, &c. applies. For example, should you prove his interest, independent of his *voir dire*, and the party introducing him, should wish to show it discharged by a release, it must be produced, and proved by a subscribing witness, if there be one within the party's power, &c.

The election by the party, of one of the above modes of establishing the interest of the witness, absolutely precludes a resort to the other.(v) And whether the witness be examined, as to his incompetency for interest on his *voir dire*, or on his oath generally, if you fail here, you cannot resort to other evidence to prove his interest.(w) And yet, after being examined on his *voir dire*, if he should appear to be incompetent from any other part of his testimony, the whole should be struck out of the case.(x) What the witness may have been heard to say, cannot be given in evidence, to show his incompetency, though it is otherwise, as to what the party calling him may have said.(y) If the party do not choose to resort to ei-

(u) Vide 1 Esp. Rep. 162. id. 164.  
Peake's N. P. C. 218. 15 East,  
57.

(v) 1 Dall. 272. 1 Mass. Rep.  
219. Peake's Ev. 136. 10 Mod. 193.  
2 Hayw. 145.

(w) 3 Day, 214.

(x) 1 Peters' Rep. 322.

(y) 8 Mass. Rep. 488.

ther of the above methods, to establish the interest of the witness, yet, on the interest appearing at any time during the trial, the witness must be rejected, and his evidence stricken out. (z) And, in order to get rid of his interest, the same strict proof of a release, or other matter of discharge is required, as in ordinary cases. (a)

But whatever interest a witness may have had, if he is divested of it by release, payment, or any other means, when he is ready to be sworn, there is then no objection to his competency. (b) And there are but few cases, in which the interest of a witness cannot be thus discharged. A release will operate upon every present right, though it be to take effect in future. (c) For its operation, generally, vide ante, 468, .9. After being released, the witness is exactly in the situation of every other witness in the cause, and may be examined to every point arising on the trial. (d) In cases where the proceeding would be evidence to support some claim of the witness, he can release such claim to the party, either with or without receiving his pay. When it will be evidence against him, and in favour of the party calling him, the party may release him; and where the party or the witness having a right thus to release, or discharge an interest, do all in their power to get rid of it, as by tendering a release, or tendering money in discharge of the interest, &c. which is refused, it is the same, in effect, as if the release, money, &c. had been accepted. (e) Concerning the power of an attorney in the cause to release a witness, vide ante, 292, 295; of a *prochein amy*, or guardian, vide ante, 301. Where the witness was released, but declared, that he still expected to pay, the release was held not to render him competent. (f)

If the interest of the witness arise by his own act, or otherwise without the consent of the party calling them, and after the fact to be proved, had happened, he is still a competent witness, and cannot thus deprive the party of his testimony.— Thus, should a witness make a bet in favour of the party's winning the cause, (g) this shall not exclude him, however it may affect his credibility. If the objection to the witness be, that he is bail, guardian, or *prochein amy*, the justice is bound to

(z) 1 T. R. 720. 1 Wightwyck, id. 170. 3 Day, 433.

64. 2 Campb. Rep. 14.

(a) 2 Campb. Rep. 14.

(b) 1 John. cas. 270. 8 John.

377. 2 Binney, 497. 1 Munf. 119, 1

Mass. Rep. 73. 18 John. 245.

(c) Co. Litt. 265. 9 John. 123. 2

(d) 2 Bay, 463.

(e) Phil. Ev. 2d Am. ed. 98, & cases there cited.

(f) 1 Con. Rep. N. S. 147.

(g) Skin. 586, 3 T. R. 27, 3 John. cas. 237.

discharge him on motion, and substitute any other proper person, who is offered. (h)

FORM of a release from a party to a witness, in order to restore his competency.

JUSTICE'S COURT.

James Jackson, }  
v. } Before Philip Green, Esq.  
John Stiles.

For value received, I do hereby release *Jacob Thomas*, a witness offered, (or to be offered) by me on the trial of this cause, of and from any claim or demand, which I now, or may hereafter have against him, by reason of the determination of this suit, or any matter, either directly or indirectly brought, or to be brought in question, in the same suit, either for or against me. And I do farther release him from all demands connected with, or depending upon the subject matter of this suit, or any part thereof, which I now, or may hereafter have, against him. Witness my hand and seal the 10th day of September, A. D. 1820.

*James Jackson.* (L. S.)

Sealed and delivered in  
presence of T. N.

If signed, &c. by an attorney, under a power for this purpose, (i) add to the signature, these words, "By *EF*, his attorney."

When the claim to be released, is in favour of more than one, jointly, a release from one, is a release from all. (j)

FORM of a release from a witness to the party.

JUSTICE'S COURT.

James Jackson, }  
v. } Before Philip Green, Esq.  
John Stiles.

For value received, I do hereby release *James Jackson*, plaintiff, in the above cause, of and from any claim or demand, which I now or may hereafter have against him, by reason of the determination of this suit, or any matter, either directly or indirectly brought, or to be brought in question, in the same suit, either for or against him. And I do farther release him from all demands, connected with, or depending upon the sub-

(h) 8 John. 407.

(i) Vide ante, 292, 294, 5.

(j) Ante, 468.

ject matter of this suit, or any part thereof, which I now or may hereafter have against him. Witness, &c.

A release from a plaintiff, to a witness, of all demands against the witness, excepting such for which the witness is liable with the defendant in the suit, renders him a competent witness for the plaintiff. *(k)*

A release given after the examination of an interested witness, is too late to render his testimony competent; *(l)* and where an objection is made at the trial, and persisted in, to the sufficiency of a release, the justice ought not to direct the examination of the witness to proceed, and that his testimony should be relied on, if the party should afterwards give a sufficient release: But where a release has been objected to, on account of some informality, and, whilst another release is preparing, the justice allows the examination to proceed, without any objection being made by the opposite party, this course is proper. *(m)* And where the examination of the witness progressed, without any objection to his competency, but it came out on that examination, after he had testified to several material facts, that he was interested, and the objection was then taken, Judge *Van Ness* suffered his interest then to be released, and held him competent, on his re-examination, to testify to the same facts, which he had already sworn to with others. *(n)*

#### *5. Of communications between attorney, &c. and client.*

The communications of a client to his attorney, solicitor or counsel, are held inviolable in courts of justice, and can never be disclosed in evidence, either in the cause in which they are made, or any other cause, even between third persons, though after the relation of attorney, &c. and client has ceased to exist. In a word, the mouth of the attorney, solicitor or counsel is shut forever, on this head, nor can they be compelled to produce papers, which have been committed to them, as professional men. But communications thus sacred, are those only which are made during the relation of which we are speaking, and not those made to a professional man, who is not retained in the cause to which they relate, however confidential they may be. This is the privilege of the party, or the client, and he alone can waive it. But it is confined to persons of the legal profession, and does not extend to medical men, clergymen and others, who are compellable to testify to what-

*(k)* 14 John. 387.

*(l)* 1 Caines, 14. 3 Binney, 311.  
14 John. 378.

*(m)* 14 John. 378.

*(n)* *Stevenson v. Jacox*, May circuit, Saratoga, 1818.



ever they learn in the course of their professions, with whatever obligations of confidence and secrecy their information may have been attended. And even the professors of the law are bound to testify, as to facts which they learned before being addressed in their professional character, or after their duties as such have ceased ; as if an attorney had been a subscribing witness, or was knowing to an erasure in a deed, which comes in question, in a cause in which he is afterwards retained, (o) or the client voluntarily communicate facts after the attorney is through with the cause, and his functions have ceased. (p) An attorney has also been examined as to the question, whether a note put into his hands, was indorsed or not ; (q) and he may be compelled to swear to the existence of a paper, and that it is in his hands, so as to admit inferior proof of its contents, if it be not produced on notice from the opposite party ; (r) or to show, that it is in court, to let in such inferior proof, upon a short notice given upon the trial to produce it. (s) — Nor does the rule prohibit a clerk or student at law from being a witness to facts, which he learned, while in the office of the attorney, with whom he is pursuing his professional studies ; though such facts are learned by him from a communication, between the attorney and his client. (t) But it has been determined in England, that the agent of an attorney cannot be thus examined. (u) The whole current of decisions appears to confine this privilege so strictly to the relation between men of the legal profession and their clients, that it seems perfectly clear, that a man employed in conducting a suit before a justice or elsewhere, who has no regular license to practice in any of our courts of record, is bound to disclose, under oath, the communications of his employer.

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## SECTION VII.

### OF THE EXAMINATION OF WITNESSES.

The form of the general oath is given by the act, (1 N. R. L. 392, s. 9.) And when a witness is ignorant of the English language, he must be sworn and examined, through an interpreter, who must be first sworn.

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(o) Vide Phil. Ev. 2d Am. ed. 102 to 105, & cases there cited.  
 (p) 13 John. 492.  
 (q) 1 Caines, 258.

(r) 17 John. 335.  
 (s) 18 id. 330.  
 (t) 1 Peter's Rep. 356.  
 (u) 2 Starkie, 239.

## FORM of the interpreter's oath.

You shall truly interpret between the court, the jury, and the witness, A B, in this cause, between C, plaintiff, and D, defendant. So help you God.

Omit the words "*the jury*," if the justice sit alone. The oath is then administered, and interpreted by the sworn interpreter, and the questions put and answers received, are also interpreted in the same way. (v)

This course is also necessary, where a deaf and dumb person is to testify signs, as mentioned ante, 588 ; and where a witness can understand what is said, but talks so very indistinctly as not to be understood, except by some familiar acquaintance, an interpreter must also be sworn, in the same form, in order to expound the answers.

When the witness has been regularly sworn, he is first to be examined by the party calling him, which is called an examination *in chief*, after which, the other party is at liberty to *cross-examine* him, when the party who called, may *re-examine*, and so on alternately till the questions are exhausted. The examination is in open court, in presence of the parties, and their counsel, the justice and jury, (if there be one) who have thus an opportunity of observing the understanding, demeanour and inclination of the witnesses.

Leading questions, that is, such as instruct a witness how to answer on material points, are not allowed, in general, on an examination in chief ; for, to direct witnesses, in their evidence, would only serve to strengthen that bias, which they are usually too much disposed to feel, in favour of the party which calls them. Thus, *did you see the defendant driving away the plaintiff's cow ? Was this on the 5th of May ? Is that cow worth \$25 ? Did the defendant say he owed the plaintiff 50 dollars, or how much did he say ?* And other questions containing in themselves, the *place, quantity, time, kind, price*, or other thing sought for in proof, are leading questions, which ought never, without substantial reason, to be put to a witness ; and if objected to, and the justice should suffer an answer, it would be error, though otherwise, if not objected to. (w) If, however, the justice finds on pursuing the examination, that the witness is backward or reluctant in the answers he gives, and is, in a word, what is

(v) 4 Mass. Rep. 81.

(w) 3 Binney, 130, & vide 6 id.

called an unwilling witness, he may then suffer the party to change his ground, and put leading questions, and, indeed allow all the latitude of a cross-examination. And, in examining a witness, to contradict directly some particular stated by the witness on the other side, a leading question may be put, on an examination in chief.

A witness cannot be compelled, (though he may do this if he pleases) to answer any question, which will expose him to a criminal charge, or any question which he thinks will tend to his crimination, or show any act of his, which is morally bad, though not legally criminal; and if the court see, that by any possibility, the answer may form the least link in the chain of proof, to convict a witness of a crime, they will not compel him to answer. This, however, is the privilege of the witness only, and he may waive it, and answer the question. A very striking illustration of this rule is given in *Cates v. Hardacre*, 3 Taunt. 444. It was an action by the indorsee against the drawer of a bill of exchange, in which the defence was usury, and one *Taylor*, who appeared to be wholly disconnected with the bill, was introduced to prove the defence, and asked by the defendant's counsel, *if the bill had ever been in his possession before?* But the witness said, *he thought the question would have a tendency to convict him of usury*, and he was excused the answer upon the ground, that the questions went to connect the witness with the bill, *and they might form links in a chain.* "When a question is propounded, it belongs to the court to consider and decide, whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it, without violating the privilege which is secured to him by law. If a direct answer to it, may criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer, without knowing what it would be; and a disclosure of that fact to the judges, would strip him of the privilege which the law allows, and which he claims." (x)

Considerable doubts have been entertained, whether a witness could be compelled to give any evidence which might subject him to a civil action, or charge him with a debt. The only adjudged case, I know of, in which this question has directly arisen, is one before the English house of Lords. The question being, according to the practice of that house, referred to the 12 judges, i. e. the Lord Chancellor, Judges of the King's Bench,

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(x) Per Ch. J. Marshall, 1  
Burr's tr. by Rob. 244.

## 606 OF THE EXAMINATION OF WITNESSES.

Common Pleas, and the Barons of the Exchequer, eight of the Judges, with the Lord Chancellor, were of opinion, that a witness is bound to answer such a question, the other four dissenting. (y) It is every day's practice in the Court of Chancery, to compel answers having this effect. (z) and it is difficult at this day to imagine any principle calculated to shake the authority of the decision in the house of Lords.

A witness can depose to such facts only, as are within his own recollection, but to assist his memory, he may use a written entry or memorandum, or the copy of a memorandum. And if the paper bring the fact to his recollection, such evidence will be sufficient. But if he cannot, from recollection, speak to the fact, except from finding it on the paper, his testimony goes for nothing. There is no need that the fact should be noted at the precise time it happened, for the witness must swear to his recollection, and it is not very material how it was brought into his mind. However, the entry should either have been made by the witness, or by another and examined by him, while he remembered the fact noted. Any paper whatever, may be shown to him, to enable him to correct a mistake.

In general, the opinion of a witness is not evidence : he must speak to facts. But in questions of science or trade, or which relate to any profession or calling, persons of skill may give their opinions in evidence. Thus, physicians, surgeons, ship builders, carpenters, and engineers, have been allowed to give their opinions on subjects connected with their professions or callings, and the value of property is every day determined in this manner. Evidence of general character is also founded in opinion. And where a witness cannot recollect a precise conversation of which he is testifying, he may give his impression as to its substance. (a)

In cross examinations, the object of which is, to sift evidence, and try the credibility of witnesses, a great latitude is allowed in the mode of putting questions. Leading questions may be asked, and every thing inquired into, which may, by any possibility, have the least connexion with the points in issue, or any of them. But this rule is still subject to certain limitations. And a witness cannot be examined, as to a fact which must, of necessity, be wholly irrelevant and impertinent, for the mere purpose of contradicting his answer ; nor, if he answer such inquiry, will the party be allowed to call a witness to contradict the answer.

(y) Vide 1 Hall's Law Journal;  
223.

(z) id.  
(a) 1 John. 99.



When a witness has once been sworn, the opposite party may cross examine him, though he give no evidence for the party calling him. And if a witness have once been examined by the party, the privilege of cross examination continues in every stage of the cause ; so that the other party may call the same witness to prove his case ; and in examining him, may ask leading questions. In the case, however, which proves the last position, the witness might possibly have shown a strong bias in favour of the party that called him, and on that account, perhaps, a greater scope was granted to the adverse party, than is usually allowed. It may happen on the other hand, that the party calls a witness unwillingly, and from mere necessity, knowing him to be favourable to the other side : in such a case, to allow the opposite party, on calling him up afterwards, as his own witness, to put leading questions, would be giving him an unreasonable advantage. On the contrary, it might, perhaps, be proper to invest the party first calling him, with some of the powers of cross-examination, and at the same time, to oblige the other party to treat such witness as strictly his own, and confine him within the limits of an examination in chief. And on a cross-examination, the party always makes the witness so far his own, that he cannot examine as to any written evidence which comes out on such cross examination in any other manner, than if the witness had been his own. Ch. J. Tilghman, in 5 Binney, 488, makes the following excellent remarks on the subject of examination : " The party who calls the witness, examines him first ; he is then cross-examined, by the opposite party, after which, if necessary, the party who produced him, may examine him again. The mouth of the witness is not to be closed, because the counsel omitted to ask a material question at first. It may be necessary, in order to come to the truth of the case, to examine him as to new matter, and after that there may be a second cross-examination. The court, at their discretion, may permit a witness to be examined over and over again, at any time during the trial. But they will take care to exercise this discretion so as not to suffer any advantage to be gained by trick or artifice. If the plaintiff should declare that he had finished his testimony, in consequence of which, the defendant should dismiss some of his witnesses, and then the plaintiff should offer to produce new testimony, which might, perhaps, have been contradicted by the witnesses who were dismissed, the court would not suffer him to avail himself of such disingenuous conduct." With this, accords the authorities cited ante, 539, 40. And where the plaintiff's witness is in part examined, and the cause is then adjourned to another day, on account of the sickness of the witness, it is the duty of the plaintiff to produce him at the adjourned day, or show good cause for not doing so ; otherwise, the justice may reject the evidence ;

for, if admitted, the defendant would lose the right of cross-examination. (b)

This right of cross-examination is highly prized by the law, and, as we have seen, courts of justice should be liberal and indulgent in its allowance. A very just latitude, in this respect, is suggested by Mr. *Evans*, in his annotations upon *Pothier*, vol. 2, p. 269, which I shall here give: "In the case of *Hunter v. Kehoe*, before the court of King's Bench, in *Ireland*, Mic. 1794, *Ridgeway, &c.* 350, Lord *Clonmell* observed, that cross-examination had gone to an unreasonable length, but he had in general permitted gentlemen to go as far as they pleased, because, if there was an honest case on the other side, it would do them no good." "The benefits of cross-examination, (says the same author) are some times defeated by the interposition of the court, to require an explanation of the motive and object of the question proposed, or to pronounce a judgment upon them immediately: whereas experience frequently shows, that it is only by an indirect, and apparently irrelevant inquiry, that a witness can be brought to divulge the truth which he had prepared himself to conceal; the explanation of the motives and tendency of the question, furnishes the witness with a caution that may wholly defeat the object of it, which might have been successfully attained, if the gradual progress, from immateriality to materiality was withheld from his observation. The importance of an inquiry may sometimes be strongly felt by an advocate, and upon very reasonable grounds from his own instructions, with respect to the bearing and circumstances of the cause, which the judge, acting only upon the impressions of what has already been disclosed, cannot, by any possibility, anticipate.—The full exposition of the motives, can only be attained by a premature exposition of the case that is to be brought forward, and even when that can be done without prejudice to the party, the endeavour to satisfy the court would have the common effect of an interruption of the regular course of inquiry, and instead of assisting the accurate discussion of the question, would, in all probability, terminate in confused and desultory altercation."

I conclude this head of the examination of witnesses, in the words of Ch. Just. Pennington: "The circumstances of the case, the probable or improbable nature of the facts detailed, the character of the witness, the manner of his giving testimony, must all be taken into consideration, and ought, after being duly weighed, to carry conviction to the mind of the jury, before they give it an effect, by their verdict. It is common for

Jury men to say in excuse for giving a wrong verdict, that they believed it was wrong, but how could they do otherways.— The facts were sworn to, it was the fault of the witness, not theirs. This practice of jurors' loading on the witness their own sins, and making him a scape goat for the whole, is grossly improper. It is true, that jurors cannot, nor ought they to substitute in the place of proof, their own fancies, conjectures, or prepossessions. much less to suffer their passions, inclinations or biasses, to come in aid of proof, but are to govern themselves by the testimony given in the cause. But should a witness relate a fact, which, from its improbable nature, or from the badness of the character of the witness, taken together with other circumstances in the cause, on due consideration, doth not carry a belief of the fact home to the minds of the jury, but on the other hand, they believe that what the witness hath related is false; in that case, what he hath said is no evidence to them, and they are not bound to give any weight to it; but on the contrary, if they act upon it, or rather make up their verdict on it, such conduct is a departure from their duty, and little short of a violation of their oaths.

After all the evidence is given in a cause, it frequently happens that the mind is in doubt. If the testimony is contradictory, it should be reconciled if possible: if it is not susceptible of reconciliation, it must be weighed by a sound discretion, and determined as one or the other preponderates. If, after all, the mind is balanced, I think it a reasonable rule, (though I do not recollect any where seeing it laid down) that it must be determined against the party that hath the affirmative side of the question, as having failed to make out what he hath undertaken to do." (Vide Pennington on small causes, 162, 3.)

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#### SECTION VIII.

#### *OF THE SEVERAL WAYS IN WHICH THE CREDIT OF A WITNESS MAY BE IMPEACHED.*

1. To impeach the credit of a witness, the opposite party may disprove the facts stated by him, or may examine other witnesses as to his general character, but they will not be allowed to speak to particular facts, or parts of his conduct; for, though every man is supposed capable of supporting the former, it is not likely that he should be prepared to answer the latter, without notice. The regular mode is to inquire whether they have the means of knowing the witness' general character, and whe-

ther from such knowledge they would believe him on his oath. In answer to such evidence against character, the other party may cross-examine the witnesses, as to their means of knowledge, or may attack their general character, and by fresh evidence, support the character of his own witness. This inquiry properly relates to the witness' character for truth and veracity, or at any rate, this should be the principal or first inquiry. (c) Chancellor Kent approves of this rule, that the inquiry should be confined to the general character of the witness for truth and veracity. (d) This is the law of Connecticut. (e) And accordingly it has been determined by the Supreme Court of this state, that you cannot impeach the credit of a witness by showing that she is, or has been a common prostitute. (f) The English rule is as first above stated, and relates to character generally; not being confined to truth and veracity, but whether from such general character, the witness is to be believed on his oath. (g)

In commenting upon the English rule, Mr. Evans(h) makes the following remarks: "It is an established rule, that witnesses examined with a view to discredit the testimony of others, cannot be permitted to depose to particular facts of criminality, but can only express their general opinion, whether the party is or is not entitled to be believed on his oath; but the other side, to support the testimony, may inquire what are the reasons of disbelief, which sometimes, as in a case(1) above adverted to, are ridiculous enough. If it is declined to inquire into these reasons, there is pretty considerable ground to presume a consciousness, that the opinion is founded upon adequate motives. I have heard witnesses asked, whether they had ever known the persons against whose veracity they depose, give false evidence in a court of justice: and upon their answering in the negative, it was intimated to the jury, that the testimony to the discredit was absolutely frivolous; whereas, if the question had been, what were the reasons upon which the discredit was founded, a fraudulent conduct might have been shown, which indicated the want of moral and religious principle, and consequently affected the strongest ground of reliance upon testimony. When witnesses speak to the character of others, not

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(1) The case adverted to by Mr. Evans, is stated in his Pothier, vol. 2. 250, as follows: "A witness swore, that a person examined on the other side, was not fit to be believed upon his oath; and being asked his reason, said, that he had never made a good fence since he came to his farm."

(c) 13 John. 505, per Thompson, Ch. J.

(d) 3 John. Ch. Rep. 565, 8.

(e) 4 Day's Esp. 104, n. (1)

(f) 13 John. 504.

(g) 4 Esp. Rep. 102 to 104, & vide 2 Evan's Poth. 250, 260.

(h) 2 Evan's Poth. 260.



only their own character, but their ability, and opportunity to form an adequate judgment, are circumstances very proper to be taken into consideration."

On this head of evidence, Ch. Justice Pennington makes the following remarks. He says,<sup>(i)</sup> that "it is bottomed on the plainest principle that can be imagined; that is, that one man is not entitled to the same credit with another. Witnesses, therefore, may be sworn to give the character of a witness examined in a cause; it is held, however, that only the general character of a witness shall be inquired into; and some hold that only the general character of the witness, *in respect of his veracity, when under oath*, is to be inquired of. I never could perceive any substantial reason for this opinion, nor is it adhered to in practice. Suppose a witness is a notorious cheat, sharper, and swindler; although nothing has been particularly alleged against him, on the ground of his veracity under oath, is he to stand, in point of credit, on equal ground with a man of unblemished character, and good standing in society? Reason revolts at the idea. I take it, that the general character of the witness, so far as it goes to show turpitude of mind, is in issue, less credit being due to a corrupt mind, than a pure one; but you cannot examine as to particular facts which are to show this corruptness of mind."

I have been thus particular in noting the English rule with some of its comments, and vindications, because I believe there is no adjudged case in this state which positively precludes its application with us; the cases which I have cited from Johnson, affording merely incidental notices of what is, in general, the proper, or rather principal inquiry in these questions of character, without expressly denying to us the latitude established in England.

2. The credit of a witness may be impeached, by showing that he has made statements out of court, either parol, by letter or by deposition, on the same subject, contrary to what he swears on the trial. Then again in order to corroborate his testimony, the party who called him, may, according to Gilbert,<sup>(j)</sup> show that he affirmed the same thing before, on other occasions, and that he is still consistent with himself; but this has since been doubted in England, by Mr. Justice Buller, and is said to have been overruled by Ch. Justice Eyre, and Mr. Phillips thinks it inadmissible, except where some design to misrepresent is imputed to the witness, arising from motives of interest or relationship: when this is done by the party or counsel on the

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<sup>(i)</sup> Penn. on small causes, 158, 9. <sup>(j)</sup> GRb. Ev. 135.

other side, he holds it proper, in order to repel such imputation, to show that the witness made a similar statement, at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts. The rule, as laid down by Gilbert, has, however, been recognized as law, in its fullest latitude, by Judge Washington, in the Circuit Court of the United States.<sup>(k)</sup> And if an attesting witness to a deed, impeach its validity on the ground of fraud, it may be supported by showing the good character of another subscribing witness, who is since dead; though where two witnesses merely contradict each other, as to facts, and no fraud is imputed, evidence of general character is not admissible in support of either.

A party will not be allowed to impeach his own witness by showing his general character, or any other facts directly impeaching him. But he may contradict him, and show the fact by other witnesses to differ from what he states it, and thus do away the effect of his testimony.

For the subject of the two last sections, more at large, and most of the authorities concerning the same, vide *Phil. Ev.* 2d Am. ed. 203 to 214.

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SECTION IX.

**OF THE CONSEQUENCES FROM THE JUSTICE'S ADMITTING IMPROPER EVIDENCE.**

The justice should be careful not to suffer any improper evidence to go to the jury, or to receive it himself, when sitting alone, if objected to; for this will be fatal on certiorari, even though he immediately direct the jury to disregard it, or return that he utterly disregarded it himself.<sup>(l)</sup> Thus, where the justice was himself sworn by another magistrate,<sup>(m)</sup> where he acted on his own private knowledge as evidence;<sup>(n)</sup> or where in an action for not attending, as a witness on a subpoena, he suffered parol evidence that the defendant had confessed being subpoenaed, without the plaintiff's first showing that the subpoena itself was incapable of being produced;<sup>(o)</sup> so where he

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<sup>(k)</sup> 1 Peter's Rep. 199. 203.

<sup>(n)</sup> 2 id. 189. 1 id. 228. 14 id.

<sup>(l)</sup> 10 John. 128. 13 id. 350. 15 id. 481.

id. 229.

<sup>(o)</sup> 10 id. 242.

<sup>(m)</sup> 1 id. 505. 5 id. 228. 10 id. 363.

received as evidence the certificate of another justice, not properly authenticated, (*p*) in all these, and a great variety of similar cases, judgments have been reversed on certiorari. So the judgment was reversed where the justice admitted hearsay evidence, touching a fact, though he returned that he merely admitted it as evidence to himself, but not to the jury. (*q*) Yet, if the fact so improperly proved, or attempted to be proved, be afterwards established by legal evidence on the other side, the error is thereby cured. (*r*) And if an improper question be put and answered, even on an examination in the jury room, after the jury are sworn and have retired, but is immediately corrected by the justice, who tells the jury not to regard it, the judgment will not, for that reason, be reversed. (*s*)

On the other hand, if the justice improperly reject any testimony offered, the judgment will be reversed, on certiorari; (*t*) and in one case, where the judgment was in favour of the party offering such evidence, but its rejection diminished the amount of his damages, he brought his certiorari, and was allowed, for that reason, to reverse his own judgment. (*u*)

# SECTION X.

## HOW THE EVIDENCE WILL BE CONSIDERED AND WEIGH- ED ON ITS BEING RETURNED UPON CERTIORARI.

The court will not reverse the judgment, because the evidence was too light in the court below, if some evidence was given; (*v*) though since the act (*w*) requiring justices to return the facts, the court exercise a more extensive jurisdiction in this respect; (*x*) and where there is either no evidence in support of a demand, (*y*) or, where a fact clearly appears from the evidence on both sides, and there is no question as to the credibility of the witnesses, a verdict of a jury will not conclude the Supreme Court; but they will inquire into the sufficiency of the evidence to support the verdict; (*z*) and if insufficient, the judgment will be reversed; (*a*) though where there is evidence on both sides, so that the question is at least doubtful, the judg-

(*p*) 3 id. 429.  
(*q*) 15 id. 239.  
(*r*) 13 id. 517.  
(*s*) 12 id. 384.  
(*t*) 6 id. 190.  
(*u*) id.

(*v*) 1 John. 520.  
(*w*) 1 N. R. L. 397.  
(*x*) 2 John. 195.  
(*y*) id.  
(*z*) 2 id. 195.  
(*a*) 3 id. 146. id. 485.

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ment will not be reversed, even if it be against the weight of evidence.(b)

An exception to the above remarks, is an action for a penalty—there, even if a verdict for defendant be against the weight of evidence decidedly, the judgment will not be reversed, if no irregularity appear.(c)

And a verdict and judgment against the plaintiff, though contrary to evidence, will not be set aside, where it is obvious that the plaintiff is entitled merely to nominal damages.(d)

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(b) 12 id. 455.

(c) 10 id. 101.

(d) 18 id. 129.



## CHAPTER XI.

### OF DAMAGES.

For the manner in which damages should be claimed by the declaration, vide ante, 389, 90.

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#### SECTION I.

##### OF DAMAGES IN GENERAL.

1. In debt, or detinue, the plaintiff recovers the specifick debt, or thing found to be due ; and the verdict and judgment is for such debt or thing, with damages for the detention, which are generally nominal.

2. In other causes cognizable, before a justice, the action is said to sound in damages, although the subject of it be a contract for the payment of money. There is, in general, but little difficulty, in determining the amount of damages, because they are, usually, a mere matter of pecuniary computation, as the money with the interest ; or the value of the thing agreed to be delivered, at the time and place of delivery, (e) the work agreed to be done, the goods sold, labour performed, &c. or, in trespass or trover, the injury done to the real estate, or the value of the goods taken and converted, some of which subjects, we have noticed under the head of the several actions to which they relate. In the present chapter, I shall content myself, with noticing a few rules, regulating the computation of damages, in certain cases, which would be doubtful of themselves, without the aid of legal authority.

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#### SECTION II.

##### OF DAMAGES IN AN ACTION UPON CONTRACT.

In estimating damages upon contract, the full sum agreed on by the parties, should, in general, be allowed. Yet if there

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(e) 1 Bay, 106.

are any circumstances of extreme and palpable hardship, fraud or deceit, though not sufficient to invalidate the contract, these may be considered, and the damages mitigated accordingly.— As if I promise you 1000 dollars to find my cow, or one cent per nail for your horse, doubling every nail in his shoes, which may amount to a very large sum, it would be legal justice to give you the value of your labour, in the one instance, or of your horse in the other.(f)

Parties sometimes agree, that, in default of performance, a certain sum shall be paid by the one who fails to perform his contract ; and the question frequently arises, whether this is a mere penalty, which, on forfeiture, is to have the effect of a penalty in a common bond ;(g) or is intended as stipulated damages, to be allowed in full, for the breach of the contract. To determine this question, attention should be given to the real intent of the parties, and the nature and terms of the agreement. Thus, should I agree to buy your horse, and pay you his value, and, if I fail, then to pay you one hundred dollars, which sum is equal to the value of the horse, this would be a penalty ; because the sum stipulated is, obviously, beyond the damages you can sustain by my refusal to receive him. But, had it been five or ten dollars, the construction would be different.(h) But even in this case of the horse, where the parties go on to say, in so many words, “ we consent to fix and liquidate the one hundred dollars, as the amount of damages to be paid by the failing party,” this would bind to the payment of the sum as stipulated damages ; for the intent is too plain to admit of construction.(i) But, “ in all cases where a party relies on the payment of liquidated damages as a discharge, it must clearly appear from the contract, that they were to be paid, or received, *absolutely in lieu of performance*. (4 Dallas’ Rep. 150. *Graham v. Bickham*.) In the case of *Slosson v. Beadle*, (7 John. Rep. 72,) and *Hasbrouck v. Tappen*, (15 John. Rep. 200) it expressly appeared, that the damages were *in lieu of performance*, and payment thereof was an alternative reserved for the party’s election.”(j) And so, if I agree, in consideration of twenty dollars, to deliver you twenty bushels of wheat, or pay you thirty dollars, upon my failure, you may recover the thirty dollars ; for the election then falls to you.(k)

Where I agree to carry goods from A to B, the difference between their value at A, and their increased value at B, is the

(f) Vide Bac. Ab. tit. damages, & cases there cited.

(g) Vide ante, 19, 20.

(h) 3 John. cas. 297, & note (a).

(i) 15 John. 200.

(j) 18 id. 225, per Woodworth, J.

(k) 7 id. 72.

proper measure of damages, for a breach of the contract ; (l) but if I had lost the goods, the plaintiff should recover in damages, only their value at the place of starting. (m) This last position settled in *Caines*, is now overruled ; (n) and the damages determined to be their value, at the place of destination ; and that too accompanied with interest on such value, if the carrier, or his agents or servants, be guilty of fraud or gross misconduct ; but not otherwise. (o)

In an action for goods of a certain quantity and description sold to the defendant, at a price agreed on, if the goods delivered do not answer the description, in consequence of which the defendant sustains a loss, this may be shown in mitigation of damages, though the goods be not returned, and notwithstanding the price is agreed. The defendant need not be driven to a cross action, nor need the goods be returned. The latter is necessary, only where the goods sold, are taken on trial, with liberty to return them within a limited period, if the vendee dislike them. (p)

I sue you in the Common Pleas ; but we agree to discontinue the suit, (which I actually do) and submit it to arbitration ; but on attempting to arbitrate, you revoke the submission : my damages are the costs of the suit, and the expenses in proceeding to arbitrate. (q)

In debt on bond, though the court have power to award execution for less than the penalty, where the damages for the breaches do not reach it in amount, yet, in general, they can render judgment for no more than the penalty. But where the condition is, for the payment of money, or any sum carrying interest, which is a question of law, and the whole sum, with interest, exceeds the penalty, there the plaintiff may recover the penalty with interest thereon, after the first instalment becomes due, or other forfeiture happens, provided so much is due by the condition, but beyond this they have in no instance gone. (r) The English cases, on this head, may all be found ranged in chronological order, in 4 Day, 35. In an action on a bond, of mere indemnity, the plaintiff must, in order to sustain an action for any thing, show that he has in fact sustained damages, and to such a bond, a plea that the plaintiff has sustained no damages (*non damnificatus*), (s) is good. In one case, where the defendant bound himself to pay a bond, due from

(l) 14 id. 170.  
 (m) 3 *Caines*, 219. 15 *John*.  
 24, contra.  
 (n) 15 *John*. 24.  
 (o) id.  
 (p) 18 id. 141, 144.  
 (q) 3 Day, 118.  
 (r) 4 Day, 30. 3 *Caines*, 48. 1  
*John*, 343.  
 (s) *Ante*, 418.

the plaintiff, and added words obliging himself to hold the plaintiff harmless and indemnified against the payment thereof. &c. It was holden, that this was a mere bond of indemnity, to which *non damnificatus*, was a good plea.<sup>(t)</sup> But, in general, where the obligor binds himself to do any act, other than mere indemnity, as to remain a true and faithful prisoner, the penalty is forfeited on omitting to perform the act.<sup>(v)</sup> And so, where the defendant covenants with the plaintiff, to keep and perform all the covenants of the plaintiff, in a certain lease, one of which covenants is, that he shall pay the rent of the premises, the covenant of the defendant is broken on the rent falling due, and remaining unpaid, though the plaintiff may not have paid any part of it himself; and *non damnificatus* is not a good plea.<sup>(v)</sup> But the amount of damages to be recovered in these two last cited cases, from Johnson, is another consideration, which was not decided by them.

In an action against a tenant for not repairing, pursuant to his agreement, enough damages should be given, to make the repairs stipulated for, but omitted by the tenant. (Salk. 141.)—And in an action for the non-delivery of wheat or other articles, the general measure of damages is, the difference between the price contracted for, and the price of the articles, when they were to have been delivered. (1 Yeates' Rep. 36.) When you sell goods to me, which belong to another, and I sell the goods to a third person, who is evicted, and sues and recovers of me the price of the goods; in an action against you, I can recover the costs of the action against me, as special damages upon breach of your warranty, besides my other damages. (7 Taunt. Rep. 153.)

On a written contract for a sum certain, the instrument itself furnishes the rule of damages, which is the principal and interest, but no more.<sup>(w)</sup> But the question frequently arises on other contracts for the payment of money, whether they shall carry interest; and there is some difficulty as to the principles upon which it is to be cast, and the time when it begins to run, upon such contracts as do carry interest. This subject was partially noticed in treating of usury; but, from the frequency of its occurrence among all classes, I shall give it a more particular consideration.

It is a general rule, that all contracts, express or implied, for the payment of money, draw interest from the time of the

(t) 14 John. 177.

(w) 1 Day, 1.

(u) 5 id. 42.

(v) 17 id. 479, & vide 1 Bos. & Pull. 638.



money falling due ; and all contracts may draw interest (if it be so agreed by the parties) from such time as shall be fixed upon by them, at or after the contract was entered into, or even before that time, if the money was in fact due, and the previous time was not agreed on, to cover usury : otherwise, no interest arises till the money fall due.(x) Thus, interest is allowable on an account stated, and balance struck.(y) And if an account be transmitted to a debtor, and lie a long time without objection, or is assented to, or presented and not objected to by him, it becomes thereby liquidated, and interest is allowable.(z) And where I settle my note or account with you, carrying interest, and give you a new note for both principal and interest, and stipulate that the new note shall carry interest on the whole, this is lawful, and cannot be objected, as usurious.(a) Interest is allowable on money had and received, or money lent and advanced, tho' no interest be stipulated ;(b) so, on a certain rent payable in money,(c) though otherwise if payable in wheat, or other specifick chattel ;(d) and such interest on rent, where payable in money, must be recovered by action, and cannot be distrained for.(e) Interest is recoverable in an action for money had and received against a sheriff, constable, &c. who neglects to pay over monies collected by him on demand.(f)—And so, in an action on the case, for money, which is lost by the negligence of a sheriff, or constable, in not collecting it.(g)

If a party accept the principal of his debt, he cannot afterwards sue for the interest.(h)

If a note mention no time of payment, it draws interest from the date, being payable immediately.(i)

Interest is not recoverable on unliquidated damages, or uncertain demands,(j) nor on open, running or unliquidated accounts, unless there be some usage of trade, or other circumstances, from which an agreement to allow interest may be inferred.(k) Nor is it recoverable upon an attorney's bill of costs, unless liquidated by agreement ;(l) nor on money due for goods sold and delivered, though to be paid for at a certain

(x) 1 Hen. & Munf. 211.  
 (y) 3 Caines. 234.  
 (z) 3 id. 234. 15 John. 409.  
 (a) 1 Hen. & Munf. 4.  
 (b) 3 Caines, 226, & 266. 3 John.  
 cas. 303. 9 John. 71. 1 Hayw. 4.  
 (c) 4 John. 133.  
 (d) 1 id. 276.  
 (e) 6 id. 43.

(f) 13 id. 255. 14 id. 255.  
 (g) 14 id. 255.  
 (h) 3 John. 229. Ante, 555.  
 (i) 2 Hayw. 32.  
 (j) 1 John. 315.  
 (k) 3 Caines, 226. 6 John. 45. 2  
 Hen. & Munf. 603. 2 Bay, 233.  
 (l) 2 Bos. & Pull. 219.

day, and at a price agreed on.(m) Though if there be an agreement to pay for such goods, in a bill or note, which is not done, interest will be allowable from the time the bill or note would have fallen due.(n) Nor is interest allowable in an action for work and labour.(o)

Interest should be calculated, according to the law of the place, where the contract is to be performed.(p) If not to be performed, by its terms, out of the country where it is made, then interest is to be cast according to the law of the place where it is entered into.(q)

When partial payments have been made on the debt, from time to time, the question has frequently arisen, in different courts in the United States, as to the mode of casting it. The only adjudication on the question, in this state, is by the Court of Chancery, as follows: "The correct mode of crediting payments, as between debtor and creditor, is, to carry them in the first place to the extinguishment of the interest due; and it is susceptible of mathematical demonstration, that if credits be not so applied, but the principal of the debt is left to continue upon interest, and interest is computed upon the payments as they are successively made, a debt will, in the course of a few years, (and the time will be longer or shorter, according to the rate of interest) be wholly extinguished by payments of interest, without paying a cent of principal."(r)

In *Connecticut*, the rule is the same, with this qualification, that the first payment shall not be applied to the extinguishment of the interest, unless it be made at least one year or more from the time when interest commenced, nor as to the subsequent payments, unless there be at least one year between them.(s) This is upon the ground, that interest cannot be due except from year to year.

Our Chancellor introduces no such qualification; and its omission is in accordance with many of the most respectable authorities in the Union. In the Superior Court of Chancery, for the *Richmond* district in the state of *Virginia*,(t) the same rule is laid down, without the *Connecticut* qualification, provided that the payment is equal to, or exceeds the interest at the time it is made; but with this addition, that where the payment is less

(m) 3 Wils. 205, 6. 2 Campb. Rep. 429.

(n) 2 Campb. Rep. 428. 13 East, 3. id. 98.

(o) 1 Campb. Rep. 50, 51, per Ed. Ellenborough, Ch. J.

(p) 2 John. 235. 17 John. 511.

(q) 2 Hayw. 5.

(r) 2 John. Ch. Rep. 209, & vide Kirby, 326.

(s) Kirby's Rep. 49, 326.

(t) 4 Hen. & Munf. 431.

than the interest due at the time, the surplus of interest must not augment the remaining capital. The *Virginia* rule has been adopted in the Superior Court of North Carolina,<sup>(u)</sup> negating that part of the *Connecticut* rule, which calculates interest from year to year, with the remark, that if the payment was less than the interest accrued, then the balance of interest must remain until the next payment.<sup>(v)</sup> This is also the law of Kentucky.<sup>(w)</sup> The result of these authorities, would seem to warrant the New-York creditor, in claiming interest at least to the extent of the rule laid down by Mr. Walsh, in his arithmetick, as the one adopted by the courts of law in Massachusetts, for casting interest in that state,<sup>(x)</sup> viz :

“ Compute the interest on the principal sum, from the time when the interest commenced, to the first time when a payment was made, which exceeds, either alone or in conjunction with the preceding payments, (if any) the interest at that time due : add that interest to the principal, and from the sum subtract the payment made at that time, together with the preceding payments (if any) and the remainder forms a new principal ; on which compute and subtract the interest, as upon the first principal : And proceed in this manner to the time of judgment. By this rule the payments are first applied to keep down the interest ; and no part of the interest ever forms a part of a principal carrying interest.”

He illustrates this rule by the following example, calculating interest at six per cent. that being the Massachusetts rate :

A, by his note, dated January 1, 1780, promises to pay B, 1000 dollars, in six months from the date, with interest from the date. On this note are the following indorsements :

Received April 1, 1780, 24 dollars.—August 1, 1780, 4 dollars. December 1, 1780, 6 dollars.—February 1, 1781, 60 dollars.—July 1, 1781, 40 dollars.—June 1, 1784, 300 dollars. September 1, 1784, 12 dollars.—January 1, 1785, 15 dollars. October 1, 1785, 50 dollars.—And the judgment is to be entered December 1, 1790.

#### CALCULATION.

The principal sum carrying interest from  
January 1, 1780 \$1000,00

(u) 1 Hayw. Rep. 279. 2 id. 17, 151.

(x) Walsh's arithmetick, 4th ed. Salem, 1818, p. 116.

(v) Vide also 4 Harris & M'Henry's Rep. of the general court of appeals in Maryland, 91.

(w) 4 Hall's Law Journal, 122.

Interest to April 1, 1780, 3 months,	15,00
Amount,	1015,00
Paid April 1, 1780, a sum exceeding the interest,	24,00
Remainder for a new principal,	991,00
Interest on 991 dollars from April 1, 1780, to February 1, 1781, 10 months,	49,55
Amount,	1040,55
Paid August 1, 1780, a sum less than the interest then due,	\$4,00
Paid December 1, 1780, do. do.	6,00
Paid February 1, 1781, do. greater do.	60,00
	70,00
Remainder for a new principal,	970,55
Interest on 970 dollars 55 cents, from February 1, 1781, to July 1, 1781, (5 months)	24,26
Amount,	994, 81
Paid July 1, 1781, a sum exceeding the interest,	40,00
Remainder for a new principal,	954,81
Interest on 954 dollars 81 cents, from July 1, 1781, to June 1, 1784, (2 years 11 months)	167,09
Amount,	1121,90
Paid June 1, 1784, a sum exceeding the interest,	300 00
Remainder for a new principal,	821,90
Interest on 821 dollars 90 cents, from June 1, 1784 to October 1, 1785, (1 year and 4 months,)	65,75
Amount,	887,65
Paid September 1, 1784, a sum less than the interest, then due,	\$12,00
Paid Jan. 1, 1785, do. do.	15,00
Paid October 1, 1785, do. greater, with the two last payments than interest then due,	50,00
	77,00
Remainder for a new principal,	810,65
Interest on 810 dollars, 65 cents, from October 1, 1785, to December 1, 1790, the time when judgment is to be entered, (5 years and 2 months,)	251,30
Judgment rendered for the amount,	1061,95



## SECTION III.

## OF DAMAGES, IN AN ACTION FOR A WRONG.

In actions for a *tort* or *wrong*, the damages may, nay should, in some cases, exceed the mere naked injury sustained. Thus, in an action for seducing a wife or daughter, or for a breach of promise of marriage, which is in nature of a *tort*, (y) exemplary damages are frequently given, on the ground of injured feeling and reputation, and upon a consideration of the fortune and rank of the parties ; (z) and other considerations to which we adverted, when speaking of these actions, ante, 188, 9. The same consideration of injured feeling has been holden a proper one in an action on the case, brought by a parent, or master, for the loss of service from an assault and battery, committed upon his child or servant. (a)

In the action of trespass, where the conduct of the defendant has been wilful, malicious, or cruel, exemplary damages, or smart money is also frequently given, by way of punishment to the defendant, and a liberal indemnity to the plaintiff for his time and expense in seeking his remedy, as well as his damages, properly so called ; (b) and an exercise of this discretion is, many times, highly salutary, and necessary. Accordingly, in an action for enticing away the plaintiff's indented seryant, the general rule is, to give damages to the value of the service, during the time of the servant's employ with the defendant ; but the jury may, in aggravated cases give the whole value of the servant, in damages. for the whole time during which he is indented. (c) Where, however, the defendant acts in good faith, supposing the goods to be his own, or seizing goods under an execution, supposing them to be the defendant's, in the execution, and in other cases, where he acts under a mistaken or doubtful right, it would be the height of absurdity to give any thing beyond the plaintiff's actual damages.

In trover or trespass for taking and converting goods, the increased value of the chattel converted at the time of demand, or even down to the time of the trial, with interest from the time of conversion, may be allowed. (d) But, in general, the measure

(y) 2 Maule &amp; Selw. 408.

(b) 14 John. 352.

(z) 2 T. R. 4. Reeve's Domestick Relations, 291. 3 John. 64. 1

(c) Anthon's N. P. Rep. 94.

Coxe's N. P. Rep. 77, 79.

(d) 2 Caine's cas. in error, 216. 2 John. 280. 3 John. 446.

(a) 2 T. R. 4.

of damages, in these cases, is the value of the goods, at the time and place of conversion.(e) though it is always proper to allow interest by way of damages upon that value, from the time the goods were taken, or wrongfully converted. A bailee, or one having a special property in chattels, being answerable to the general owner, unless he takes good care of them, may recover their whole value in damages, against the wrong doer, who takes them away ;(f) and this, though the bailment is merely gratuitous.(g) In trover for a bill of exchange, the measure of damages is the principal and interest due thereon, at the time of the conversion.(h)

Where a man takes actual possession of my land, I can only recover damages for his first entry, whilst I continue out of possession, but after I obtain possession by an action of ejectment, or otherwise re-enter, I can then recover for all his mesne occupation, as well as his first entry, (laying the trespass, as having been continued, from the first entry down to the time of bringing the action,) which distinction is the foundation of the common action of trespass for the mesne profits, consequent upon an action of ejectment.(i) The measure of damages in this action is, the value of the land from the time of the demise laid in the declaration in ejectment ;(j) and where the judgment is by default, the costs of the ejectment are also a proper item of damages, as well as the use of the land.(k) And a recovery of damages in the ejectment, is no bar to an action for the mesne profits.(l) But this action for mesne profits is an equitable action, and will allow of every kind of equitable defence.(m) Of course, the plaintiff can recover no more, than the value of the land, deducting all reasonable improvements and repairs made by the defendant, during the time for which the plaintiff has a right to claim the profits, in which he can be confined to six years, next before action commenced, provided the defendant pleads the statute of limitations, as he has a right to do.(n) In an action for encroaching on the plaintiff's wharf or landing, the rule of damages is the current value of the landing, during the time of the encroachment.(o)

In an action against a sheriff for an escape from mesne process, (and by parity against a constable, for an escape from a warrant,) the plaintiff is entitled, *prima facie*, to recover his

(e) 14 John. 123, Anthon's N. P. Rep. 156.

(f) 5 Binney, 457.

(g) 1 Barnwell & Alderson's Rep. 59.

(h) 3 Campb. Rep. 477.

(i) Co. Litt. 257.

(j) 1 John. 281.

(k) 3 id. 481.

(l) 1 John. cas. 281.

(m) 2 id. 438.

(n) 9 id. 324.

(o) Anthon's N. P. Rep. 25.

whole demand, as it stood against the original defendant ; and it lies with the defendant in the action for the escape, to show that the plaintiff's damage is less than his whole debt, by proving the inability of the defendant to pay. And it seems, that if the original defendant has property at the time of the escape; the plaintiff is entitled to recover the whole value of such property, as damages in the action for an escape, if it do not exceed the debt due from the one who escaped, with the costs of the action from which he escaped. This is upon the presumption, that the confinement of the defendant would have coerced the appropriation of such property to the payment of the debt. (p)



## SECTION IV.

## OF DAMAGES IN REFERENCE TO THE TIME WHEN THE ACTION IS COMMENCED, AND THE FORM OF PROCEEDING IN THE SAME.

We have before seen, that the plaintiff can recover no more damages than he claims by his declaration. (1 Caines, 593.) If the jury find more, he must relinquish the excess ; (q) and this must be done before the justice renders judgment ; if not done till afterwards, it is too late to save the judgment from a reversal for the error. (Vide 4 John. 414.) (r) So, where the jury find damages for the defendant, when he is entitled to none ; as where no set off is claimed or allowable ; the defendant may remit, and the justice may strike out the damages found, and give judgment for the defendant, generally. (4 John. 414.)

It is, moreover, a general rule, that the plaintiff cannot, in a personal action (and this kind of action alone is cognizable before a justice) recover any damages, except those which arose before the commencement of the suit. (s) But wherever a duty is incurred, pending the suit, incident to, or growing out of the cause of action for which the suit is brought, for which no satisfaction can be had by a new suit, such duty shall be included in the judgment to be given in the action already depending. Thus, in an action of *assumpsit* for principal and interest, the latter should be brought down to the time of the judgment, the interest being a mere accessory to the principal, for which no

(p) 9 John. 300.

(q) Bac. Ab. tit. Damages, (D) 2.

(r) 2 Str. 1110, 2 Blac. 79 Rep.

(s) 10 Co. 116, 117.

separate action will lie.<sup>(t)</sup> But when a new action will lie for any duties or demands arising since action brought, they cannot be included in the first suit. Thus, in an action of covenant for the non-payment of rent, if any rent fall due after action commenced, it must be made the subject of a subsequent suit. And in trespass, and indeed, in torts, generally, new actions may be brought as often as new injuries and wrongs are repeated, and hence damages ought to be assessed only up to the time of the wrong complained of.<sup>(u)</sup> Upon this principle it is, that where the plaintiff declares that the defendant enticed away his servant, by which he lost his service, from such a time, (before the commencement of the suit,) to such a day, (after the commencement of the suit) and judgment is given for the plaintiff, generally, without distinguishing that damages are allowed for the time only which preceded the commencement of the suit, such judgment is erroneous.<sup>(v)</sup> And it is a general rule, that where a declaration claims damages, as arising from some matter, either previous to the plaintiff's having any cause of action, or subsequent to the commencement of the suit, and a verdict or judgment is rendered upon such a declaration for damages generally, it is erroneous; for it appears from the face of the proceedings, in such a case, that the plaintiff's whole claim was allowed, or if it was not so allowed in fact, it is impossible to know this from any thing appearing in the verdict or judgment, by which the damages are assessed.<sup>(w)</sup> To remedy this, the jury who give their verdict, or the justice who gives judgment for the damages, may, in such verdict or judgment, state specially, that damages are given only for the particular time allowable.



## SECTION V.

### OF ASSESSING THE DAMAGES, WHERE THERE ARE SEVERAL DEFENDANTS.

If several defendants are, in the same action, charged with a joint wrong, and all are found guilty, the damages must be joint, and one cannot be found guilty in so much damages, and another in another; <sup>(x)</sup> for, in such case, we have seen that the act of one defendant is the act of all; <sup>(y)</sup> and is not, therefore, sus-

<sup>(t)</sup> 2 Burr. 1086 & 7.3; John. 229.

<sup>(u)</sup> 2 Burr. 1087.

<sup>(v)</sup> 2 Saund. 169.

<sup>(w)</sup> Vide 2 Williams' Saund. 171.

<sup>(x)</sup> *id.*

<sup>(y)</sup> *Ante*, 576.



ceptible of severance. Where there are several defendants, one or more of whom join issue, and the others either confess the action, generally, thus leaving the damages to be assessed, or where they demur and have judgment against them, or do not plead at all, so that no issue is joined as to them; in this, or the like cases, where a jury is demanded for trial, the damages should still be assessed all at one time, and the venire should run in these words, "*as well to try the issue joined, as to inquire of the damages, between James Jackson, plaintiff, and A, B, C, D, and E, defendants.*" In such cases the jury, where those who plead are acquitted, may, in an action for a tort, assess damages against the others. And it is the nature of a tort, that one defendant may be found guilty, and another acquitted, according to the truth of the case, excepting the instance noticed ante, 491. But this is generally otherwise in assumpsit, covenant and other actions, sounding in contract, where the plea of one, if found true, shall acquit all, even though the others do not plead, or where they have judgment pass against them upon demurrer; for, in these cases, the plea generally goes to the whole cause of action. Yet to this there are exceptions, as where one pleads the insolvent act, bankruptcy, infancy, or other defence merely personal in its nature.<sup>(z)</sup> Here, though the plea be found true, it is a defence strictly confined to the person who pleads it; and does not go, like defences in most other cases, to destroy the right of action in respect to all the defendants.<sup>(a)</sup>

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(z) 3 Caines, 4, 2 John. 279. 5  
Id. 160.

(a) Vide Bac. Ab. tit. damages,  
D. 4.

## CHAPTER XII.

### OF JUDGMENT.

A justice, having no power to arrest a judgment or award a new trial, (a) the next subject I shall consider, is, the different kinds of judgment he is to give, upon the various matters litigated before him, premising, however, that in whatever language or form the judgment may be given, the law will, notwithstanding, consider what should have been the judgment in the given case, and ascribe the proper effect to it, whether it be worded or conceived in proper form or not. Thus, where a justice waited the four days and then gave judgment of non-suit, against the plaintiff, not having a right so to do, the Supreme Court considered it the same as though a judgment on the merits had been rendered, and held it a bar to another suit. (c) So, where no judgment was rendered by the justice on the verdict of a jury, the Supreme Court considered what ought to be done in this respect, as done, overlooking this lack of form, and making the verdict a bar to a subsequent suit. (d) And so, by a parity of reasoning, where a final judgment, as on the merits, is given, when it ought to be a non-suit, &c. it can only have the effect of a non-suit, whatever the magistrate may call it.

It is then material to consider the different kinds of judgment, in order to determine their nature and operation only ; without regard to the form of their entry, which is no where preserved in practice among the proceedings of the justice, except, perhaps, when he sets it forth in a return to a writ of certiorari.

Judgments are the sentence of the law, pronounced by the court, upon the matter contained in the record. This record is drawn up with a good deal of formality, in the higher courts, and sets forth the pleadings, continuances, jury process, verdict, judgment, &c. and though the form is hardly known in a justice's court, yet the substantial rules of proceeding therein, rest upon the same principles, as in the highest Courts of Common Law. These judgments are of four sorts. 1. Where the facts are confessed by the parties, and the law determined by the court ; as in case of judgment upon *demurrer*. 2. Where the law is admitted by the parties, and the facts disputed ; as in case

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(b) 2 John. 181.

(c) 11 id. 457.

(d) 2 id. 181, 197.

of judgment upon a *verdict*, or the *finding of facts* by the justice. 3. Where both the fact and the law arising thereon are admitted by the defendant, which is the case of a judgment by *confession*; *default*, properly speaking, being inapplicable to a justice's court; or 4. and lastly, where the plaintiff is convinced, that either the facts, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution; which is the case in judgments upon a *non-suit* or *retraxit*, &c.

The judgment, though pronounced or awarded by the justice, is not his determination or sentence, but the determination or sentence of the *law*. It is the conclusion, that naturally and regularly follows from the premises of law and fact which stand in the syllogistic form, noticed ante, 501, while speaking of demurrers and issues. (e) This judgment cannot be rendered on Sunday. (15 John. 119.)

1. Suppose the defendant demurs to my whole declaration, or to any single count of my declaration, and I join in demurrer, the justice gives a *judgment*, that my declaration, or count, is *sufficient* or *insufficient* in law: if there is an issue of fact upon some of the counts, he gives a separate judgment upon the count demurred to, that it is *sufficient* or *insufficient*, and then goes on to try and decide the issue of fact, thus rendering two separate judgments in the cause; and so, if any other pleading in the cause be demurred to, or one pleading questioned by demurrer, and the other taken issue upon, as to the fact; for all the issues, both of law and fact, must be disposed of by the proper judgment.

2. Several issues of fact may also be joined in a cause, upon different counts, or upon different pleas, on some of which a verdict or judgment may pass for the plaintiff, and upon some for the defendant; as where several different pleas are interposed to, and issues joined upon different counts in declaration.

There is no such thing in a justice's court, as a judgment by default against the defendant. His absence at the return day of the process, or at the adjourned day, is not construed into a confession of any thing. But the justice must, in such case, first waiting for the plaintiff to appear, (which is essential,) (f) proceed at the very place mentioned in the process, (g) or, appointed by the adjournment; and the demand must be proved in the same manner, as if the defendant had appeared and deni-

(e) & vide 3 Blac. Com. 395, 6.

(f) 9 John. 140.

(g) 1 John. cas. 243. 12 John. 417.

ed it.(*h*) When the defendant, however, neglects to appear at the return day of the process, and the justice has either begun to hear testimony in the cause, or has adjourned it to another day,(*i*) the defendant is then precluded from giving any evidence on his part, except in mitigation of damages; and has no right to introduce, or prove any matter which would be the proper subject of a plea. This he may do, if he appear at any time before the cause is finally submitted; and where an issue has been joined and the cause adjourned, if the defendant appear at the adjourned day, at any time before the cause is finally submitted, though the trial may have progressed, and the plaintiff may have closed his case, yet he may go into his full defence upon the issue joined, the same as though he had appeared in the first instance.(*j*) And when the defendant neglects to appear at the return of the process, the justice cannot, at any time before hearing evidence, enter his default, and preclude his pleading in the cause, even though he do not answer when the cause is called on.(*k*)

3. The confession of a judgment may be, where the defendant is summoned, or his goods attached, or he is brought into court on a warrant. If he confess on the return of a summons or attachment, this may be done in writing, if duly proved in the absence of the defendant, or of any one to appear in his behalf,(vide 6 John. 126. 15 id. 476;) but such written confession must be proved, the same as any other writing.(9 John. 140.) This should be done on the return day, or some adjourned day in court. If it be done at any other time, or if a confession be taken upon a warrant, without the defendant being brought into court thereupon, it is out of the ordinary course of proceeding in a suit, and would be subject to all the nice rules of a voluntary confession.(*l*)

Where the confession is voluntary, and without any process first issued, or where, though process has issued, the confession is not made in the regular course of the cause, the following rules ought to be strictly adhered to.

1. The plaintiff must appear in court, in some of the ways mentioned ante, chapter 5.(*m*)

2. The defendant must also appear at the same time in some of the ways mentioned in that chapter.(*n*) And this appearance cannot be dispensed with, even though he authorize the justice,

(*h*) 10 John. 106. 1 N. R. L. 338,  
2. 2 Caines, 96.

(*i*) 11 John. 69.

(*j*) 16 John. 180.

(*k*) 15 id. 36.

(*l*) 9 id. 140.

(*m*) 9 id. 140.

(*n*) 6 John. 126. 15 John. 476.



under his hand and seal, to enter a judgment, and the execution of such instrument is duly proved by a witness.(o)

3. The confession must be for a specifick sum. Thus, a judgment entered on such a sum, as A and B should award, is bad, the confession being made before the award is declared; for a justice has no power to enter a judgment upon a confession for an uncertain and unliquidated amount.(p) And where the parties appeared in the cause, and agreed before the justice to refer the cause to him and another, and that the justice should enter judgment for the amount of the award, which he did, this was holden error,(q) though the direct contrary has since, it seems, been determined by the court of errors, in *Yates v. Russell*.(r) A confession for such demand as the plaintiff shall present to the justice, is revocable, at any time before judgment entered thereon. (3 John. 147.)

Voluntary confessions of judgment have become more important, and the operation in perfecting them, more nice and difficult, since the late act to extend the jurisdiction of justices.(s) By the 6th section of that act, it is provided "that it shall be lawful for any justice of the peace within this state, to enter a judgment by confession of the defendant, in all cases where the judgment so confessed, shall not exceed 100 dollars, with such stay of execution as may be agreed on by the parties interested in said judgment."

By the 15th section of this act, it is provided, "that no judgment shall be entered by confession, by virtue of the 6th section of this act, unless such confession shall be in writing, and signed by the defendant, which writing shall be filed with the said justice."

By the 7th section of the same act, it is provided, "that the defendant in any judgment to be entered by confession, before any justice of the peace, by virtue of the 6th section of this act, shall, before the entering the same, set forth the particular items of the demand, and make oath, that he is honestly and justly indebted to the plaintiff in the sum to be named in the said judgment, over and above all just demands, which the defendant may have against him, and that the confession of judgment as aforesaid, is not made for the purpose of defrauding any creditor." "And any judgment, entered by confession as aforesaid, where the defendant shall not comply with the provisions of this section, shall be void."

(o) 15 id. 476.

(p) id. 423.

(q) id.

(r) 17 id. 461.

(s) Sess. 41, ch. 94, s. 6.

The provisions of this act, rendering the judgment *void*, and extending, as it does in terms, to all judgments confessed before a justice, be the sum greater or smaller, it would be advisable, (at least until a judicial construction shall authorize a different practice) to exercise the precaution of a strict compliance with the forms which it requires in all confessions, be the amount what it will. "Void things are as no things;" and neither the justice nor any concerned in rendering or executing the judgment, would be protected by it, without a strict adherence to the act.

In addition, then, to the requisites which we have already mentioned, the following are rendered necessary by the above statute :

#### 4. A specification.

##### *Form of a specification.*

THE PARTICULAR items of the demand, upon which a judgment is to be confessed by *Richard Roe*, in favour of *James Jackson*.

RICHARD ROE, to JAMES JACKSON,		Dr.
April 1st, 1819,	To cash lent,	\$5.00
„ 29th, „	To 3 yards broad cloth, at \$5,	15.00
May 30th,	To 25 lbs. pork, at 12 1-2 cents,	3,12 1-2
July 1st, „	To one day's work ploughing, with self and team,	2.00
„ 25th, „	To money paid on your note, given by you to John Doe,	25.00
„ 30th, „	To 5 loads of wood at \$1,	5.00
		<hr/>
		\$55,12 1-2
		Cr.
August 19th, 1819,	By cash,	\$3.00
September 2d, „	By 1 lb. butter,	12 1-2
October 30th, „	By 16 lbs. hog's lard, at 12 1-2 cents,	2.00
		<hr/>
		5,12 1-2
		Balance due, \$50.00

#### 5. The confession.

##### *Form of the confession.*

SARATOGA COUNTY, ss.

To *Philip Green, Esq.* one of the justices of the peace of the said county. I do hereby confess judgment before you,

in favour of *James Jackson*, for the sum of fifty dollars, with stay of execution for six calendar months from this date, (*or such time as is agreed on, if any.*) Dated the 10th Nov. 1820.  
*Richard Roe.*

### 5. The oath.

#### *Form of the oath.*

SARATOGA COUNTY, ss. *Richard Roe*, maketh oath and saith, that he is honestly and justly indebted to *James Jackson*, in the sum of fifty dollars, over and above all just demands, which the deponent hath against him, and, that the confession of judgment for that sum, is not to be made for the purpose of defrauding any creditor.

*Richard Roe.*

Sworn the 10th Nov. 1820, before me,

*Philip Green*, Justice of the Peace.

A judgment may be confessed, as a security for money, or other thing afterwards to be advanced or furnished, and so expressed in the particular; in which case, it will bind only to the extent of the money actually advanced, or other thing furnished. <sup>(t)</sup> This was decided in relation to a confession on bond and warrant of attorney in the Supreme Court, under a statute, <sup>(u)</sup> which also required a specification, though it is now repealed. That statute requires no oath to the truth of the specification, but there was such a resemblance both in the wording and spirit of that act, to the one which regulates confessions before a justice in this particular, as leaves no doubt that the authority last cited, is applicable to this proceeding before a justice, so far as the nature of the debt or demand is concerned. Indeed, it is difficult to conceive why a just and legal demand may not as well be ingrafted upon the consideration of an engagement for future advances, as upon those already made; or why the defendant might not be as correct in attesting, on oath, to the honesty and justice of such a demand, as of any other.

With regard, then, to the form of the specification, there can be no doubt, that the words of the statute relative to confessions before a justice, require as great precision and particularity, as that regulating confessions of judgment in the Superior Courts. The latter required the plaintiff to file a *particular statement and specification of the nature and considera-*

(t) 16 John. 165.

(u) Sess. 41, ch. 59, s. 3.

tion of the debt or demand on which the judgment was to be confessed. In construing this statute, the Supreme Court say, "the object of the act was to prevent abuse and fraud in the entry of judgments by confession on bonds and warrants of attorney. The specification ought to be so particular and precise, as to apprise all persons interested of the nature and consideration of the debt. A statement as general as the common counts in a declaration, is not sufficient.(v) It ought to be as precise, at least, as a bill of particulars.(w) If, for example, the consideration was for goods sold, the specification ought to state the kind, quantity and price of the goods, and the time of sale, as in a bill of parcels. If the consideration was for a horse, or cattle sold, it should be so mentioned, and the price as well as the time of sale.(x)

By the 9th section of the 50 dollar act, the plaintiff is entitled, on demand, to a transcript of any judgment rendered in virtue of that act, with the bond (if any) to stay execution, in order, by filing them with the county clerk, to render the judgment a lien on real estate. Hence, although no formal record is, in general, necessary of a justice's judgment, yet, in judgments under this act, the statute evidently presupposes the entry sufficiently formal, to exhibit in the transcript thereof, the great outlines of a common law record, so far, at least, as to convey, in a shape legally definite, the necessary information to the clerk, who may afterwards be called to issue the execution. It is material, for instance, that the transcript state whether the judgment was rendered upon contract, or for some wrong; for it is upon a judgment on contract only, that interest is recoverable,(y) the direction for which is given by the execution.

*Form of entering a judgment by confession.*

James Jackson,

v.

Richard Roe.

SARATOGA COUNTY, ss.

At a court, holden before me, Philip Green, Esq. one of the justices of the peace of the said county, at my office in the village of Saratoga Springs, in the said county, on the 10th day of September, A. D. 1820, the above named parties appear, and the said Richard Roe confesses judgment in favour of the said James Jackson, in a plea of trespass on the case, upon contract, for fifty dollars (as per written confession, and partic-

(v) Ante, 369 to 372.

(w) Id. 510, 11.

(x) 16 John. 150.

(y) 1 N. R. L. 506.



ular of demand on file) with stay of execution, for six calendar months from this day.

Damages,	\$50
Justice's costs,	62
Clerk's fees,	49
	<hr/>
	\$51,11

It is, therefore, considered by the said court, now here, that the said *James Jackson* do recover, against the said *Richard Roe*, the said sum of fifty dollars, above confessed, and his costs of suit, taxed at one dollar and eleven cents.

When the above is transcribed for the clerk, add,

(" A transcript.")

" *Philip Green*, justice."

*Form of entering judgment in other cases, under the 50 dollar act.*

*James Jackson,*

v.

*Richard Roe.*

SARATOGA COUNTY, ss.

At a court holden before me, *Philip Green, Esq.* one of the justices of the peace of the said county, at my office, in the town of Saratoga Springs, in the said county, on the 10th day of September, A. D. 1820, the above named parties appearing in court, after hearing their proofs and allegations in a plea of trespass on the case, upon contract,

Damages,	\$50
Costs in justice's court,	4,51
Clerk's fees,	49
	<hr/>
	\$55,00

It is considered by the said court, now here, that the said *James Jackson* do recover, against the said *Richard Roe*, fifty dollars damages, and his costs of suit, taxed at five dollars, making in the whole, \$55.

To be transcribed as above directed.—If the plaintiff alone appear, and the defendant make default, state the fact accordingly, and that on hearing the proofs and allegations of the plaintiff, judgment is rendered, &c. And if the justice have taken time for advisement, so that neither of the parties are present at the rendition of the judgment, omit the entry as to the appearance of the parties altogether. Where the judgment is against joint debtors, part only appearing, or having been served with process, it should be stated in the record, for the reasons mentioned, ante, 270.

These are the only cases, perhaps (if we except convictions under the act for laying a duty on strong liquors, and for regu-

lating inns and taverns) in which form is at all necessary in the docket of the justice. This docket is usually kept merely as a brief memorandum of the commencement, and material steps in a cause, on to judgment and execution, and I know of no statute or rule, which requires any thing more. However desirable a more perfect record may be, it is pretty obvious, that a reformation, in this respect, cannot be effected, short of some positive provision by statute ; and even this would be very like oppression to the magistrate, while limited to his present stinted and wretched tariff of compensation.

The form of a conviction under the act to lay a duty on strong liquors, &c. is given by the 25 dollar act, (z) which is or ought to be in every magistrate's hands, and I shall not repeat it here. The form there given, like all statute forms, must be pursued with the greatest exactness, or it will be void, (a) and will not operate as evidence in bar of another suit. (b) In filling it up, however, though no particular day of the offence be proved, the justice may insert the day stated in the declaration, or other day, as nearly as he can arrive at the particular time. from the proof in the cause (c) It has been decided in one case, that a form of conviction given by statute, must be strictly pursued, and where this was omitted, the justice and constable were holden liable to the party, in an action of trespass for the value of goods seized upon an execution, issued upon such a defective conviction. (d)

And where a cause, having been adjourned, became discontinued by the non-appearance of the plaintiff at the adjourned day ; and more than a month after, a person who had been authorized by the defendant, to appear and confess a judgment for him at the adjourned day, came before the justice, and without the knowledge of the defendant, confessed a judgment to the plaintiff, as of the day to which the cause was adjourned, it was held, that the judgment, being void. the defendant might avail himself of the irregularity, in an action upon it. (e)

4. Where the plaintiff makes default at the return of the process, or other appearance-day in court, judgment of *non pros* or *non-suit* goes against him. So, if he do not appear, when the jury return to give their verdict, the same consequence follows. (f) And we have seen, that he may also be non-suited on account of the insufficiency of his evidence, to sustain the suit. (g) or where he is himself satisfied, that this is

(z) 1 N. R. L. 30, s. 8.

(a) 3 Esp. Rep. 198.

(b) 6 John. 101.

(c) 13 id. 253.

(d) 3 Esp. Rep. 198.

(e) 15 John. 244.

(f) Ante, 543, 4.

(g) Ante, 540.

the case, he may submit to a non-suit expressly, which is what people mean when they say the plaintiff has *withdrawn* his suit. (h)

Another mode in which the suit may be determined, is, by the plaintiff's entering, or directing the justice to enter what is called a *retraxit* or *nolle prosequi*, that is, a declaration upon the files or docket of the justice, that he, the plaintiff, *will not further prosecute his suit*. Upon this being done, judgment is given for the defendant, in the usual terms of a final judgment, *that the defendant go thereof without day*, and recover his costs. This judgment, upon a *retraxit* or *nolle prosequi*, is a perpetual bar to another action for the same cause, and is considered equivalent to a release. (i) The entry thereof, must, therefore, be made in proper person, and cannot be done by attorney. (j)

The judgments we have been considering, are, generally, final, and may be pleaded in bar to a new action brought to litigate the same matter over again. (k) The only exceptions which occur to me are, a judgment rendered against the plaintiff upon *demurrer*, for some defect in his pleading, or upon a plea in *abatement*, or judgment of *non-suit* or *non pros*. (l)

Again, judgments are either *interlocutory* or *final*.

1. *Interlocutory* judgments, are such as are given upon some plea or proceeding, which is only intermediate, and does not finally determine or complete the suit. Thus, upon a plea in abatement, if the plaintiff take issue thereupon, and it is found in his favour, the judgment is *final*, that he recover. (m) But if an issue of *nul tiel record* be found against the defendant upon a plea in abatement, (n) or, if the plaintiff demur to the defendant's plea in abatement, (o) or the defendant demur to the plaintiff's replication thereto, and in either case, the issue in law, is decided in favour of the plaintiff. (p) judgment of *respondeas ouster*, that is, that the defendant *answer over*, is given, in which case he must plead *de novo*. It is easy to observe, that the judgment here given, is not final, but merely *interlocutory*; for there are afterwards further proceedings to be had, when the defendant hath put in a further answer. (q) —

(h) id. 527, 8, 9.

(i) 8 Co. 115. 10 John. 221, per Kent, C. J.

(j) id.

(k) Vide ante, 446 to 457.

(l) Vide 6 John. 199.

(m) 2 Saund. 210. n. 3. 1 East, 544. 2 Wils. 368.

(n) 1 John. cas. 398. Coleman, 98. S. C.

(o) 2 Saund. 210. n. 3. 1 Bac. Ab. 30. 2 Wils. 368.

(p) 1 East. 542.

(q) 3 Black. Com. 396, 7.

But a judgment in favour of the plaintiff, on an issue of fact joined upon a plea in abatement, in a justice's court, is final, and even shuts out the defendant's set off.(r)

2. *Final judgments* are such, as at once put an end to the action, by declaring, that the plaintiff has either entitled himself or has not, to recover the claim he sues for.(s)

In all cases of final judgment, rendered by a justice, it is peremptory, and collectable of the proper goods and chattels of the defendant, or the plaintiff. Even where the plaintiff sued as administrator, and the defendant overbalanced him in the suit by a set off against his intestate, it was holden that the judgment was collectable of the plaintiff's proper goods, and not, as at common law, of the goods of his intestate.(t) In a proceeding against joint debtors, though only one be served with process, the judgment should be against all. (4 John. 223.)

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(r) 12 John. 205.

(s) 3 Black. Com. 396, 7.

(t) 10 John. 366, & vide 1 John. cas. 228.



## CHAPTER XIII. OF THE COSTS.

THE judgment being determined on, in the mind of the justice, the next subject in the order of consideration, will be the costs of the suit. By the 11th section of the 25 dollar act, <sup>(u)</sup> if the plaintiff be non-suited, or discontinue, or withdraw his action, without the defendant's consent, judgment is to be given against him for the costs. But if this be done by consent of parties, it seems to follow, from the wording of this section, that each party should pay his own costs, unless otherwise agreed. <sup>(v)</sup> By the same section, if the plaintiff be found indebted to the defendant, or the defendant to the plaintiff, judgment is to follow in favour of the successful party for the debt or damages and costs, and in all cases where a debt or damages are recoverable, costs are given of course, without regard to the nature of the action, or the character in which the parties sue or are sued. <sup>(w)</sup>

The costs here spoken of, and for which judgment is given, are the costs which the *prevailing party* is entitled to recover, according to the act, taking no notice of the costs of the losing party. <sup>(x)</sup> And should any part of the latter be taxed in the judgment, it will be reversed, as to the costs, though it will stand good, as to the debt or damages; in which last case, each party is obliged to pay his own costs of the certiorari. <sup>(y)</sup> Thus, where, in a judgment for the defendant, the justice taxed and included all the costs which had accrued on the part of the plaintiff, to wit. summons, constable's fees for service, swearing the plaintiff's witnesses, &c. <sup>(z)</sup> And where, in a judgment for the plaintiff, he taxed subpoenas for subpoenaing the defendant's witnesses; <sup>(a)</sup> and where he included the costs of *swearing* the defendant's witnesses, in a judgment for the plaintiff; in each of these cases, the judgment was reversed upon the principle mentioned.

The plaintiff, sometimes, is entitled to recover *double* or *treble* his costs; and whenever a statute gives him *double* or *treble* damages, he is entitled to have his costs *doubled* or *trebled*,

<sup>(u)</sup> 1 N. R. L. 393.

<sup>(v)</sup> & vide 1 Caines, 66. 5 John.

<sup>(w)</sup> 1 John. 317, per Kent, Ch. J.

<sup>(x)</sup> Penn. on small causes, 181.

<sup>(y)</sup> 15 John. 195.

<sup>(z)</sup> 13 id. 350.

<sup>(a)</sup> 14 id. 369.

though the statute say nothing of the *costs* by that name or title. An example of this is, in the act concerning trespasses on land. (b) Double costs are also, many times, to be taxed for the defendant, and particularly in actions against officers, and officers or others, acting under the authority of some statute, as mentioned ante, 423, n. (8) (c) as well as in many cases scattered through the statute book by particular provision; as officers under the act for the establishment of common schools, (d) the act concerning the militia, (e) &c. &c.

The following are the fees for services, as allowed by the 25 dollar act: (1 N. R. L. 399, s. 26.)

#### JUSTICE'S FEES.

Summons,	\$0.09
Warrant,	12 1-2
Recognizance for attachment,	12 1-2
Attachment,	19
Judgment,	12 1-2
Administering each oath,	6
Subpœna for each witness,	6
Adjournment,	9
Venire,	19
Swearing jury,	12 1-2
Execution,	19

#### CONSTABLE'S FEES.

Serving a summons—*mileage*—for one mile, or under, \$0.12 1-2  
For every mile more, 6

Mileage to be computed from the place of abode of the defendant, or where he shall be found, to the place where the summons is returnable.

Serving a warrant, and notifying the plaintiff—*mileage*—the same as on a summons;

*Mileage* on an attachment, the same;

*Mileage* on an execution, the same.

Copy of a summons,	\$0.09
Summoning a jury,	37 1-2
Serving an attachment,	50
Serving every execution, for every dollar due thereon,	5

(b) 1 N. R. L. 525. 3 John. 342.  
14 id. 328.

(c) & vide 1 N. R. L. 155.

(d) Sess. 43, ch. 122, s. 2.

(e) Sess. 42, ch. 219, s. 30.

The constable is entitled to his poundage upon an execution, though he merely levy on property, and the parties compromise without a sale ;(f) to be computed according to the amount of property levied on. And he is entitled to his full fees immediately, on taking the defendant's body.(g) But where he has not actually served the execution, by a levy or arrest, and a compromise or payment is made between the parties, of which he has notice, of course, nothing is due to him, for he has done nothing officially.

## WITNESSES' FEES.

Every witness from a foreign county, attending and sworn, (per day,) 30 miles to be called a day's travel, as in courts of record,(h) \$0,25

Every other witness, attending and sworn, (no mileage allowed,) 12 1-2

A justice is not liable to be sued by a witness for his fees, although he may have received them. The witness should look to the party subpoenaing him,(i) and the justice is accountable over to the party. In the witness' action against the party, he can recover the statute fees only, and nothing more, even though he be a foreign witness.(j)

## JURORS' FEES.

For all causes tried by them, each, - - - \$0,12 1-2  
Summoned, attending, and not trying the cause, - 6

## OTHER FEES.

Serving subpoena on each witness, - - - \$0,12 1-2

But fees for service on 4 witnesses only can be taxed, in any one cause ; and if more than this be allowed, the judgment will be reversed as to the costs.(k)

Fees for necessary exemplifications of records, are also a proper item in the taxation of costs.(l) The fees for these copies are fixed by our several statutes, regulating the compensation to the Register, Clerks, &c. of our different courts.

(f) 1 Caines, 192.

(g) 5 John. 252.

(h) Ante, 518, 19.

(i) 4 John. 351.

(j) 4 John. 257. Ante, 529.

(k) 9 John. 130.

(l) 18 id. 336.

But all these costs, to be recovered by the successful party, cannot, in general, exceed five dollars. The only exceptions are, in a suit where a foreign witness is subpoenaed, or in a proceeding by attachment. In these cases, the fees of the foreign witness, 50 cents for serving the attachment, and 12 1-2 cents for taking the recognizance, may be added to the judgment beyond the \$5. Yet, if the costs improperly exceed the \$5, this will not render the judgment void, so as to subject the justice to an action, but is error merely.<sup>(m)</sup>

*Fees for services, under the act to extend the jurisdiction of justice's of the peace. (Sess. 41, ch. 94.)*

These are the same as under the 25 dollar act, except in the following particulars :

#### JUSTICE'S FEES.

For taking a bond with security, - - -	\$0,25
Entering judgment by confession, for a sum exceeding \$50, - - - - -	25
Transcript of a judgment, - - - - -	25
Making and filing return on appeal, - - -	75

#### CLERK'S FEES.

Filing transcript, - - - - -	\$0,6
Filing bond, - - - - -	6
Recording judgment, - - - - -	12 1-2
For execution, - - - - -	25

Under the statute of costs relating to Courts of Record, it is the constant practice to tax fees for those *prospective* services ordinarily necessary in the perfecting and collection of the judgment ; such as the record, execution and return of the same, all which are, however, deducted on settling the judgment, provided they are not afterwards, in fact, performed.<sup>(n)</sup> And this is the only way, in a justice's court, in which the plaintiff can recover his full costs ; for the judgment for costs can never be increased to meet the subsequent services, by any act of the justice. Accordingly, the fees for those services which must, in all probability, be performed, ought, doubtless, to be taxed prospectively. Thus, fees for the execution in all cases, and the oath to procure the execution, where the original process was a warrant, sworn out against a resident defendant, the clerk's fees, and fees for a transcript, where the judgment may

<sup>(m)</sup> 17 John. 145. Ante, 219.

<sup>(n)</sup> Laws, sess. 41, ch. 259, s. 5.



be made a lien on real estate, &c. are proper subjects of taxation within this rule ; and I do not see how the statute, authorizing the party to recover his costs, can be carried into effect in any other way.

Where a judgment of non-suit is rendered by the justice, but no costs awarded, it is incapable either of affirmance or reversal ; and, on certiorari, the Supreme Court will give no judgment one way or the other.(o) But it is otherwise, where any costs are awarded ; for, in the latter case, a certiorari will lie.(p)

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(o) 2 John. 8.

(p) id. 9.

## CHAPTER XIV.

### OF STAYING PROCEEDINGS.

A justice has no authority, or discretion to stay proceedings in a cause, or dismiss the suit, where the plaintiff has been nonsuited in a suit brought for the same cause of action, because the costs of the former action are unpaid.<sup>(i)</sup>

But where judgment is obtained before the justice, against the sheriff, for a negligent escape from the gaol liberties, where a bond for the liberties has been given, the justice may stay the proceedings in the cause, until the defendant has a reasonable time to proceed by suit against the bail.<sup>(j)</sup>

This should be an application and oath of the defendant, or some person in his behalf, acquainted with the facts, and had better be an affidavit in writing, stating the grounds of the motion, due notice being given to the opposite party, that the application will be made. Or it may be on oath administered, *to make true answers to such questions as shall be put, touching the propriety of staying proceedings in the cause.* It should appear on oath, how much the penalty of the bond amounts to, in order to determine the length of time necessary to collect it, which depends on the question whether it be collectable under the 25 or 50 dollar act, or only in a Court of Record. If in a justice's court, the time for collection would, of course, be shorter than in a Court of Record. Should the justice, however, on the first motion, fail to allow sufficient time, he could extend it on another application, always requiring the defendant to exercise due diligence, according to the course of the court in which he sues.

If the plaintiff is not present when the defendant makes his application, he should draw up his affidavit, swear to it before the magistrate who tried the cause, serve a copy of it on the opposite party, with notice of the time and place of the motion to stay proceedings, for such time as the justice shall direct. This, in the Supreme Court, would be a four-day notice. He should then make affidavit of having served the copy and notice, before the same justice, or prove it by parol before the justice, on the day of the motion, unless the party appears and admits the ser-

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(i) 10 John 363.

(j) 1 N. R. L. 430, 9 John. 369.

vice, and the justice will then determine what time the proceedings are to stay, unless good cause is shown against the motion by the opposite party.

In *McIntire v. Woods*, sheriff of Washington, <sup>(k)</sup> a judgment was obtained against the defendant, in the Supreme Court, in August Term, 1809. In February Term, 1810, application was made to stay proceedings, till the November Term following. This would give the sheriff a chance for a trial at the Washington Circuit, in June, 1810, a judgment at the following August Term, and an execution against the property of the bail, returnable at the next November Term, to which time the court stayed the proceedings.

Now, in this case, had the bail, when the Circuit arrived, put over the cause on affidavit, to the Circuit of the next year, no doubt the Supreme Court would, on a new application, have stayed proceedings to November Term, of the next year, so that the time must depend on the circumstances of each case, to be considered by the justice.

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(k) 5 John. 357.

## CHAPTER XV.

### OF EXECUTION.



#### SECTION I.

##### OF THE FORM AND RENEWAL OF AN EXECUTION.

*Form of execution for damages and costs, on a judgment upon contract, in favour of the plaintiff.*

SARATOGA COUNTY, ss.

*Philip Green, Esq.* one of the justices of the peace of the said county, to any constable of the said county, Greeting: You are hereby commanded, in the name of the people of the state of New-York, to levy the sum of twenty-four dollars with interest, from the 10th day of September last, until paid of the goods and chattels of *Richard Roe*, defendant (his arms and accoutrements, and such other articles as are exempt by law, excepted) and bring the money before me, the said justice, within thirty days from the date hereof, to render to *James Jackson*, plaintiff, for his damages and costs, recovered before me. the said justice, against the said defendant; and, if no sufficient goods and chattels of the said defendant can be found, to satisfy this execution, you are hereby further commanded, in the name of the said people, to take the body of the said defendant, and convey him to the keeper of the common gaol of the said county, there to remain till discharged according to law. Hereof fail not at your peril. Given under my hand, at the town of Saratoga Springs, in the said county, the 10th day of October, A. D. 1820.

*Philip Green, Justice.*

Describe the parties according to their character, as directed ante, 249, 50. Interest upon a judgment, (unless upon a bond with a penalty) was collectable at common law, only by debt upon the judgment: (k) not by execution, till a late statute, which gives interest on judgments founded upon contract only. (l)

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(k) 6 John. 283.

(l) 1 N. R. L. 509.



In judgment for a tort or wrong, therefore, the above direction to collect interest, should be omitted. In an execution upon a judgment in an action of debt, you simply substitute the word *debt*, instead of *damages*. An execution in favour of the defendant is in the same form, inverting the description of the parties, by substituting the word *defendant* for *plaintiff*, and *plaintiff* for *defendant*. And where the defendant's recovery is for mere costs, and no debt or damages, upon a set off, the execution should run *for his costs, recovered before me, &c.* instead of *his damages and costs, or debt and costs, &c.* The form of the execution, when issued by the justice, is the same as above directed, upon a judgment under the 50 dollar act, except, that, instead of *thirty days* in the above form, you substitute the words, *ninety days*.

*Form of an execution, to be issued by the county clerk where a transcript has been filed.*

#### SARATOGA COUNTY, ss.

The people of the state of New-York, to our sheriff of our said county, Greeting : We command you to levy the sum of 55 dollars, with interest, from the 10th day of September last, of the goods and chattels, lands and tenements of *Richard Roe*, in your bailiwick ; and make sale thereof according to law, to render to *James Jackson*, for his damages and costs lately recovered by him, before *Philip Green*, Esq. one of our justices of the peace of the said county of Saratoga, by the consideration and judgment of the said *Philip Green*, whereof the said *Richard Roe* is convicted, as appears to us of record : and provided goods and chattels, lands and tenements whereon to levy, sufficient to satisfy this execution, cannot be found in your bailiwick, within forty five days from the date hereof ; then we further command you, after the said forty-five days, and not sooner, (unless, after diligent search, no goods or chattels, lands and tenements can be found, whereon to levy) to take the body of the said *Richard Roe*, and commit him to the gaol of the said county, there to remain, until discharged by due course of law. And, that you make return of your proceedings herein, within ninety days from the date hereof, with this writ. Hereof fail not at your peril. Witness *Philip Green*, Esq. our said justice, at Saratoga Springs, in the said county, the 10th day of October, A. D. 1820.

*Thomas Palmer, Clerk.(m)*

When any of the above executions issue against joint debtors, only part of whom have been served with process, or have ap-

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(m) Vide Sess. 41, ch. 94, s. 10,  
also ch. 265, s. 3.

peared in the cause, the command of the execution should then be as follows :

“ To levy the sum, &c. of the goods and chattels of A and B,” (*the defendants*) “ holden by them jointly, or the goods and chattels of A” (*the defendant served, or who appeared*) &c. (n) And the command for the arrest and imprisonment of the body should be, “ to take the body of the said A,” (*the one served, or who appeared*) “ and convey” (or “ commit”) “ him, &c.” (o)

If, after the transcript filed with the clerk, the plaintiff is afraid the defendant will abscond from the county, he may prove, by evidence on oath, to the satisfaction of the justice, that there is good reason to believe, that such will be the case, unless the execution shall, in the first instance, be against the body or property of the defendant. In this, he cannot be a witness himself. (p) (*Vide Brown v. Hinchman, 9 John. 75.*) On making this proof, the justice must then certify the same to the clerk, who must, in such case, issue the execution according to the tenor of the 10th section of the 50 dollar act, leaving out the words, “ *within 45 days from the date hereof,*” and the words, “ *after the said 45 days and not sooner, unless, after diligent search, no goods or chattels, lands and tenements, can be found whereon to levy,*” which leaves it on the same footing, in regard to taking the body, as an execution under the 25 dollar act. (q)

#### *Form of the oath to the witness.*

You shall true answers make, to such questions as shall be put to you, touching the necessity of an execution, in the first instance, against the property and body of *Richard Roe*, upon the judgment against him before me, in favour of *James Jackson*. So help you God.

#### *Form of the justice's certificate.*

To THOMAS PALMER, Esq. Clerk of the county of Saratoga : I certify, that it has been made to appear, by evidence on oath, to my satisfaction, that there is good reason to believe, that *Richard Roe* will abscond from the said county, unless the execution on the judgment rendered by me, *Philip Green*, one of the justices of the peace, of the said county, against the said *Richard Roe*, in favour of *James Jackson*, and now on record in your office, shall, in the first instance, be against the pro-

(n) Vide ante, 270.  
(o) Ante, 269, 70.

(p) Vide Sess. 41, ch. 265, s. 3.  
(q) Vide id.

perty and body of the said *Richard Roc*. Given under my hand, at Saratoga Springs, in the said county, the 1st day of February, A. D. 1820.

*Philip Green.*

If nothing is done under the first execution, or only part of the money is levied, the party may, in all cases, have further execution until he is satisfied ; but where an execution is levied or any step taken under it, it is irregular to issue a second one, until the first is returned.<sup>(r)</sup> And when the execution is issued by the justice, he may renew it from time to time, without any formal written return thereon. The information of the constable, that nothing could be found under it, is sufficient. Yet it is only where either no goods, or not sufficient could be found under the first, that the constable would be warranted in procuring a renewal. (1 N. R. L. 393, s. 11. 12 John. 322, per Yates, Justice.)

There is no need in such case, of issuing a new execution, or altering the date of the old one, but the original execution, may be renewed from time to time by an indorsement thereon, in the following form, made by the justice who issued it :

*Form of renewing an execution.*

This execution renewed. Nov. 11th, 1820.

*Henry Newkirk*, Justice of the Peace.<sup>(s)</sup>

This renewal is a judicial act of the justice, and as such will protect the justice, and all those who act under it. The indorsement of the renewal is conclusive evidence, that the proper information was given to the justice, in order to warrant it.<sup>(t)</sup>

I have known a difficulty in the minds of some, in determining whether an execution on which a conditional execution is indorsed, under the 11th section of the 25 dollar act, must be kept alive like all others, by a renewal from one return day to another. It is obvious, however, on comparing the several sections of the act which relate to this subject, that this is not necessary ; but the indorsement of the exemption by the magistrate, operates in itself, as a renewal, or is equivalent thereto, till the instalments are all discharged ; and, that consequently, on a default in paying them, the constable may take either property or body, though after the return day of the execution. (Vide 1 N. R. L. 394, s. 11. id. 305, s. 13. id. 396, s. 14.)

<sup>(r)</sup> 8 John. 337.

<sup>(s)</sup> 12 id. 320.

<sup>(t)</sup> id. Vide 1 N. R. L. 393, s. 11.

## SECTION II.

## HOW AN EXECUTION MAY BE SUPERSEDED—WHEN IT MAY ISSUE—AND ON WHAT TERMS IT MAY BE STAYED.

1. It is a settled principle, that wherever there is, after judgment, and before execution, a change of the parties, either plaintiff or defendant, by *marriage, insolvency, or death*, whereby other persons become interested in the execution of the judgment, the execution is superseded, and a new action upon the judgment is necessary, in order to make such new person a party to the judgment :<sup>(u)</sup> except, indeed, where there are two or more plaintiffs or defendants. In such case, where one or more of either the plaintiffs or defendants survive, execution may be taken out, either by or against such survivor or survivors ; but it must be taken out in the joint names of all the plaintiffs or defendants, the same as though they were alive ; for otherwise, it will not appear to be warranted by the judgment.<sup>(v)</sup> In case of death, however, it is settled, that where the execution is tested, (i. e. dated) in the plaintiff's or defendant's life time, it may, in all cases, be executed after his death ; though it would be otherwise, if tested after his death. (Vide Tidd, 915, 16, and cases there cited.) In *Asborn v. Moss*, 7 John. 161, it will be perceived by the plea, that a justice's execution was issued and levied in the defendant's life time, and the goods sold after his death ; the propriety of this course was not drawn in question, by the counsel in that cause.

2. Except on a change of parties as above, execution may issue, of course, and immediately, against all persons, unless they be freeholders, or inhabitants having families.<sup>(w)</sup> And against these it may issue immediately, if the justice is satisfied, upon the oath of the party or some one else, that he will be in danger of losing his demand, unless execution go immediately.

*Form of the oath to obtain execution.*

You shall true answers make, to such questions as shall be put to you, touching the necessity of an immediate execution

<sup>(u)</sup> 17 John. 271. Tidd's Practice, 1021.

<sup>(s)</sup> Tidd's Practice, 1029.  
<sup>(w)</sup> Vide ante, 254.



against *Richard Roe*, upon the judgment in your favour before me. So help you God.

If this proof be not made, execution cannot go under thirty days. This is to be reckoned inclusive of the day of giving the judgment. (x) But even where this proof is made, the party can still have the 30 days, on giving security. (y) Toll gatherers, against whom judgment was obtained, under the "act relative to turnpike roads," were formerly an exception to these remarks, but by a late act, they are placed on the same footing with others. (z)

*Form of security to stay execution 30 days.*

*James Jackson,*

v.

*Richard Roe.*

} Damages and costs, \$25.

Judgment for the above sum, having been this day rendered, against the above defendant, in favour of the above plaintiff, before *Philip Green, Esq.* one of the justices of the peace, of the county of *Saratoga*, I do hereby covenant and agree with the said plaintiff, that the above defendant will pay the said sum to him, before, or at the expiration of 30 days. Dated and sealed, this 10th day of September, A. D 1820.

*John Doe. (L. S.)*

Sealed and delivered, in presence of A. B.

No particular form for this security is given by the statute. It may, therefore, be in the above form, or by bond or recognition, or it may be without seal, setting forth the reason and consideration of the contract, as in case of adjournment, ante, 511, 12; or it may be by judgment confessed jointly, by the defendant and the bail. (a) I have adopted the above sealed form as the shortest. (b)

In this, and all other cases, where bail is offered in the stay of execution, if there be any doubt or dispute of his competency, let him swear to his competency upon the principles, and in the form mentioned ante, 513, 14.

The stay of execution under the fifty dollar act, will be the same as in other cases. But the defendant may stay it three

(x) Vide 1 N. R. L. 394, s. 11.  
Ante, 143, 4.

(y) 1 N. R. L. 394, s. 11.

(z) Sess. 42, ch. 149.

(a) 12 John. 571.

(b) & vide ante, 300, as to operation of seal.

calendar months from the time of entering the same, (to be computed inclusive of the first day, (c) on giving a bond in the following form :(d)

*Form of bond to stay execution under 50 dollar act.*

Know all men by these presents, that we, *Richard Roe* and *John Doe*, are held and firmly bound unto *James Jackson*, in the sum of one hundred dollars, (*double the amount of the judgment*) to be paid to the said *James Jackson*, or his certain attorney, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by the presents. Sealed with our seals.— Dated the 10th day of September, A. D. 1820.

The condition of the above obligation is such, that whereas the above named *James Jackson* hath obtained a judgment against the above bounden *Richard Roe*, in a certain court, holden before *Philip Green, Esq.* one of the justices of the peace of the county of Saratoga, for the sum of fifty dollars, including costs, which judgment was rendered upon contract, (*or wrong as the case is*) on the day of the date hereof: Now therefore, if the said *Richard Roe* shall pay, or cause to be paid to the said *James Jackson*, the said sum, with lawful interest, (*if on contract, otherwise omit the words, "with lawful interest"*) at, or before the expiration of three calendar months from the said time when the said judgment was rendered, or surrender his body in execution on the said judgment, within thirty days thereafter, then this obligation to be void, otherwise of force.

Sealed and delivered, in  
presence of A. B.

*Richard Roe.* (L. S.)  
*John Doe.* (L. S.)

By the statute, 1 N. R. L. 393, s. 11, if the defendant shall, on the hearing of the cause (except in a case of a trespass, proved on the trial, to be *wilful and malicious*) prove to the satisfaction of the justice, by his own oath, or otherwise, that he has a family in the state, for whom he provides, and is not a freeholder, the justice shall indorse such proof upon the execution which, provided the defendant also give the proper security, stays the arrest of the defendant's body, under the execution, provided he pays the constable holding it, by monthly instalments of 1 dollar and 50 cents, to be computed from the day of rendering judgment inclusive.(e) On his default, how-

(c) Ante, 143, 4.  
(d) Sess. 41, ch. 94, s. 8.

(e) Vide ante, 143, 4.

ever, he loses this privilege entirely. *(f)* The defendant is entitled to this exemption, whether he reside in the county where the judgment is obtained, or in a foreign county. *(g)*

*Form of indorsing proof of exemption.*

It was proved to my satisfaction, by the within named defendant, on the hearing of the within mentioned cause, that he has a family in this state, for which he provided, and is not a freeholder.

*Philip Green.* Justice.

This proof must be on the hearing of the cause, and an offer to make it after judgment, comes too late. *(h)* It is not merely *ex parte*, but when offered in season, the justice should hear proof on both sides, if offered. *(i)* As to what constitutes a freeholder, or man of a family, vide ante, 254.

*Form of the security, upon defendant's proving his right to exemption.*

James Jackson,

v.

Richard Roe

} Damages and costs, \$30.

Judgment for the above sum, having been this day rendered against the above defendant, in favour of the above plaintiff, before *Philip Green, Esq.* one of the justices of the peace of the county of Saratoga; and the said defendant having proved on the hearing of the said cause, to the satisfaction of the said justice, that he has a family in this state, for which he provides, and is not a freeholder, now, therefore, in order to entitle the said defendant to his exemption from imprisonment, pursuant to the statute in such case made and provided, and for value received, I do covenant and agree with the above plaintiff, that the said defendant will be within the county of Saratoga, so that his body may be taken in execution on the said judgment, provided the instalments of the said judgment shall not be paid, according to the first proviso of the 11th section of the "act for the recovery of debts to the value of 25 dollars." Witness my hand and seal, the 10th day of September. A. D. 1820.

*John Doe.* (L. S.)

When default is made in paying the instalments, as they become due, or any one of them, the security is made liable by

*(f)* Vide 1 N. R. L. 393, s. 11,  
& Laws, sess. 39, ch. 236, s. 45.

*(h)* 14 id. 382.

*(i)* id.

*(g)* 13 John. 328.

the law, sess. 39, ch. 236, s. 45, to pay the whole judgment, unless he produces the body of the defendant, and surrenders it in execution within 30 days after such default.

By a subsequent statute, (*j*) if the contract on which judgment is rendered, was entered into, since the first day of May, 1819, and the party, whether plaintiff or defendant, prove, at the time of the judgment, by his own oath or otherwise, to the satisfaction of the justice, that he is a house holder in this state, and not a freeholder; in such case, where the judgment does not exceed ten dollars, the body of the defendant is absolutely exempt, and the clause touching the arrest and imprisonment of the defendant, which must otherwise be inserted in the execution, must, in this case, be omitted.

*Form of the oath to be administered to the party, in order to prove his right to exemption from imprisonment.*

You shall true answers make, to such questions as shall be put to you, touching your right to the exemption of your body from imprisonment, upon any execution to be issued in this cause. So help you God.

The form of this oath will serve on all applications for exemption of the body, without regard to the act under which it is made.

In the first case, we have seen, that the justice is not to allow the claim of exemption, if the judgment is rendered for a trespass, proved on the trial to be *wilful* and *malicious*. This is a question to be decided by the justice, according to the circumstances of the case, as they present themselves in the course of the investigation; and his decision upon these premises is conclusive, and cannot be reviewed. Even every *voluntary* trespass is not, of itself, *wilful* and *malicious*. The statute seems to have meant, by the words *wilful* and *malicious*, some act done in bad faith, or with an intention to injure and vex the plaintiff, or with a consciousness of violating right. (*k*) Every trespass, it is said, however, is *wilful*, where it is committed after notice not to commit the injury, and *malicious*, where it appears to be done in order to harrass the plaintiff. (*l*) And it has been holden that a trespass committed after notice to the contrary, is both *wilful* and *malicious*. (*m*) But it is evident, from the case above noted in the 6th Johnson, that such a conclusion is not universal. A mere constructive trespass is not *wilful* and *malicious*: it

(*j*) Sess. 42, ch. 101, s. 9.

(*k*) 6 John. 277.

(*l*) 3 Blac. Com. 214.

(*m*) Vide Esp. Dig. Am. ed. vol. 1. pt. 2. 322.



must be voluntary in fact, to give it that character. Thus, in an action against a sheriff, for the trespass of his deputy, or a master, for the act of his servant, and the like, the action arising from construction of law, and not from the conduct of the defendant himself, it cannot be deemed wilful and malicious, within the act.(n)

If the justice issue an execution, before it is legally due, he is a wrongdoer, and accountable for the levy or arrest under it, in an action of trover, trespass, or false imprisonment. It is an excess of jurisdiction.(o) A justice may, by statute, issue an execution, at any time within 30 days, after his removal from office.(p)

### SECTION III.

#### OF SERVING AND RETURNING THE EXECUTION.

1 This process is directed to any constable of the county where the justice resides, and is to be executed by him, though the justice may, if he think proper, depute some other proper person to do this, in the form given ante, 287.

2. On receiving the execution, it is the duty of the constable to make immediate search for goods and chattels, as directed by it, and in default of finding any, or sufficient to satisfy the demand, to arrest the defendant and commit him to prison, unless exempted in some of the ways we have mentioned.

3. The form of this execution, so far as the *object* of levy is concerned, is of equal compass with the English writ of *fieri facias*. It commands the constable to levy the debt of the *goods and chattels*, &c.(q) If these words mean the same here as in a *fieri facias*, even *terms for years* are subject to a justice's execution. What there may be, in the law of this state, to restrain this meaning, I am not at present aware. This question was raised by the counsel in a cause argued at the last January Term of the Supreme Court, (1821,) the names of the parties to which, I do not remember. In that cause, Mr. Lynch urged several arguments, which have always appeared to me conclu-

(n) Vide 3 Caines, 174.

(o) Vide 2 John. cas. 49. 3 id. 84.  
Ante, 217, 18.

(p) 1 N. R. L. 398, s. 22.

(q) id. 393, s. 11, & vide Tidd's  
Practice, 913.

sive, in favour of a constable's right to sell terms for years.— Mr. *N. Williams* opposed to this doctrine his usual research and ingenuity. His arguments, if I recollect right, were drawn from several parts of the 25 dollar act, which he insisted, were incompatible with the right claimed. Should this be a material point in the cause, we shall shortly have a decision of this question, which, from its importance, will doubtless appear in Mr. Johnson's Reports. In the mean time, I think I am warranted in ascribing to a justice's execution, the same right of levy with the English *fieri facias* upon any chattels *other than terms for years*.

By this precept, then, the constable has, (subject to the exceptions hereafter mentioned,) a right to seize and sell every thing that is a chattel, belonging to the defendant; and it has even been holden, that if the defendant have two gowns, one of them is subject to execution. He may sell every thing which is raised annually by the labour of the husbandman, as corn growing, which goes to the executor; (r) and a purchase under an execution, of corn, or other emblements growing, carries with it to the purchaser, the right of ingress, egress and regress, to cut and carry away the crop. (s) A constable may also levy on, and sell all such fixtures as the tenant has a right to remove from the premises. But furnaces, apples upon trees, or other articles which belong to the freehold, and go to the heir, and which includes all such things as are growing upon land, but which are not raised annually by labour and manurance, cannot be sold upon this precept. (t) The question as to what things fixed to the freehold, may be removed, relates to tenants for life, or years. These tenants may remove, (and they are consequently liable to execution,) all chimney pieces, and even wainscot, put up by themselves. So of beds, fastened to the ceiling with ropes, or even where they are nailed. So they may remove all such things put up by them, as are necessary for trade, such as brewing utensils, bark mills, (u) furnaces, coppers, fire engines, cider mills, &c. &c. which they have erected, and by which, they not only enjoy the profit of the estate, but also carry on a species of trade. (v) The law of the question, when fixtures shall be deemed personal property, and when not, is very fully considered, and the authorities on the subject ably summed up, by Lord *Ellenborough*, in *Elwes v. Maw*, 3 East's Rep. 38, and the doctrine of that case, has received the sanction of our own courts. (w) According to that authority the above erections must, in order to be removable by tenant for

(r) 2 John. 418. id. 421. n.

(s) 9 id. 108.

(t) Vide Toller's L. E. 114, & cases there cited.

(u) 6 John. 5.

(v) Vide Woodf. L. & T. 280 to 285, & cases there cited.

(w) 17 John. 116, 121, per Platt, J.

life or years, be set up *in relation to some trade*; and they are even then not removable, if the lessee suffer them to continue after the expiration of his lease. But erections set up in relation to agriculture, or calculated for the mere enjoyment of the inheritance, belong to the owner of the inheritance. Another class of articles, removable during his term by tenant for years, are, erections made by him, for the purposes of ornament; as ornamental marble chimney pieces, pier glasses, hangings, wainscot, fixed only by screws, and the like. (3 East, 53.) Within the distinction established by *Elwes v. Maw*, it seems that *machinery for spinning flax and tow, and carding machines, used in a manufactory, and which are attached to the building by an upright board, resting on the frames and fastened at the ceiling, and by cleets nailed to the floor, round the feet of the frames, but the machines or frames themselves, not nailed to the building, are personal property.*(x) But in order to constitute any building, put up by the tenant, a *fixture*, irremovable by him, though it relate to agriculture, it must be fixed to the inheritance in some way. Accordingly, a *barn put upon pattens, or blocks of timber, but not fixed in or to the ground, is removable.*(y)

Trees, millstones, grass, &c. sold by the owner of the land or inheritance, to the defendant, although they have not been actually severed from the freehold, are also considered in law the personal property of the vendee, and may be taken by execution against him.(z) Money in the constable's hands, belonging to the defendant, may also be taken;(a) and so may bank bills, or money in the defendant's possession, and, indeed, all chattels belonging to the defendant, of a tangible nature;(b) but the constable cannot take common promissory notes, bills of exchange, or other choses in action.(c) The reason why bank bills are distinguishable from other notes, in this respect, is, that they are considered as money, and a tender in such bills would be good, if not objected to, on that account.(d) The constable, moreover, cannot take goods pawned, pledged or gaged for debt, nor goods demised or letten for years, nor goods distrained, or taken and in custody of the sheriff or any other constable upon a former execution or attachment, for these are in the custody of the law;(vide Show. 173,) and goods in the custody of the law are not even distrainable for taxes, as being in the possession of the party.(e) Nor can the constable take any thing which cannot be sold, as deeds, writings, &c.(f)—

(x) 17 John. 116.

(y) Bull. N. P. 34. 3 East, 55,  
per Ld. Ellenborough, Ch. J.

(z) 11 East, 362. 3 Day, 476.

(a) 12 John. 220, 395.

(b) id,

(c) id.

(d) 12 John. 220, per Spencer, J.

(e) 17 John. 128.

(f) Vide Tidd's Practice, 917, &  
the cases there cited.

Bank shares are not the subject of execution.(g) And money belonging to the defendant, which the same or another constable has levied, or raised on an execution, in favour of the defendant, against another, cannot be retained or levied on by him. Such money never having been paid over to the defendant, has not become his specific property, and is, for that reason, no more the subject of a levy, than any other debt due to him, or any chose in action.(h)

The goods of two joint tenants, or tenants in common, may be taken for the separate debt of one of them, and sold. All, however, which passes by the sale, is the interest or share of the individual; and the purchaser succeeds to his right, as a tenant in common.(i) If partnership property be seized and sold for the individual debt of one of the firm, the share of such individual passes, but it is subject to the payment and settlement of the partnership dues; and the remainder only, after discharging these, passes to the purchaser.(j)

The exceptions to the subjects of levy above mentioned, arise out of various statutes.

1. By the very terms of the execution, the *arms and accoutrements* of the defendant are made an exception.(k)

2. All *sheep*, to the number of 20, with their *fleeces*, and the *cloth* manufactured from the same; 1 *cow*, 2 *swine*, and the *pork* of the same; all necessary *wearing apparel* and *bedding*; necessary *cooking utensils*; 1 *table*, 6 *chairs*, 6 *knives and forks*, 6 *plates*, and 6 *tea cups and saucers*, owned by any person, being a householder.(l)

3. *Pews*, in any church, or house of public worship; the *family bible*, or *school books* used by or in the family of the debtor.(m)

If the constable is sued in trespass or trover, for selling *necessary cooking utensils*, &c. it lies with the plaintiff to show affirmatively and certainly, that the articles were necessary, and not merely that they might be useful in cooking.(n) The above provision, exempting certain property of a householder from execution, was intended for the benefit of poor and destitute families; and the father and husband, or head of the family, who

(g) 9 John. 96.

(h) 1 Cranch, 117. Chipman, 66.

(i) 9 John. 108. 16 id. 108. 15 id. 180.

(j) 16 John. 109.

(k) 1 N. R. L. 393, s. 11.

(l) Sess. 38, ch. 227.

(m) Sess. 42, ch. 101, s. 8.

(n) 14 John. 434.



has left the state, leaving his wife and children living together; is still, notwithstanding, a *householder* within the meaning of the act. And a wife has no right to waive the husband's privilege, in his absence, and consent to a sale of his exempt property, even to save other articles which are seized and liable to sale, unless she have some special authority from her husband. (o) In defining the word *householder*, as used in the act, Judge Platt makes the following remarks: (p) "According to the lexicographers, *household* means, 'a family living together,' and a *householder*, 'a master of a family.' Sacred Scripture, in the same sense, declares, 'he that provideth not for his own household, is worse than an infidel.' I think it clear, that the legislature meant to confer this privilege on each of those little primary communities, called *families*. Murray, (the plaintiff,) had gone to Ohio, leaving his wife and children living together as a *family*. They were his *household*, and he was the *householder*. To say, that a family, while in the act of removal, and on the highway, may be deprived of their bed, and their cow, on execution, because they did not, for the time, inhabit a dwelling-house, would be a perversion of the statute. So long as they remain together as a *family*, without being broken up, and incorporated into other families, the privilege remains."

It is proper to remark here, that where the defendant in the execution, sues the constable for levying on his property, the constable's authority is sufficiently made out, by producing and proving the execution alone, without the judgment. (q)

The constable may take any goods which have been sold or conveyed away by the defendant, in order to delay, hinder, or defraud creditors. A principal badge of fraud, in all such cases, is, the defendant's continuing in possession of the goods, after the pretended sale. (r) And in a case of clashing executions, it has been holden, that the defendant's continuing in possession of only a part of the goods levied upon, by the senior execution, is evidence of fraud, as to the whole levy, to let in a levy upon a junior execution upon other goods, taken and actually removed by the senior execution. (s) Possession is, however, only, *prima facie*, evidence of fraud, and may be explained by showing the transaction to have been, in fact, *bona fide*. (t) — Fraud is a question of law, where there is no dispute about the facts; and a voluntary sale, with an agreement, that the vendor may keep possession, is, except in special cases, and for spe-

(o) 18 id. 400.

(p) id. 402, 3.

(q) 12 id. 395.

(r) Vide Tidd's Practice, 919, & cases there cited.

(s) 15 John. 430.

(t) 5 id. 258. 8 id. 446.

\*cial reasons, to be shown and approved by the court, fraudulent and void, as against creditors.(u) But a sale void, as to creditors, is good against the party, his executors and administrators.(v)

Your being in possession of my goods, does not expose them to an execution against you, though you may be the reputed owner, unless there be some fraudulent or deceptive purpose shown, or implied from the circumstances of the case ;(w) nor does my knowing of a judgment against the vendor, render my purchase of him void, unless I act fraudulently ;(x) though it is void, if I purchase with a view to defeat the judgment.(y)—And, where the purchaser, under an execution, is not the creditor, but some third person, purchasing *bona fide*, his leaving the goods in the debtor's hands, is not fraudulent.(z) So, if the property be ponderous, or fixed to the freehold, and possession be taken from the debtor within a reasonable or convenient time, its remaining in the debtor's hands is not, under these circumstances, evidence of fraud.(a)

Again—A man may always lawfully prefer one honest creditor to another, where no bankrupt law intervenes ; and this, though the debtor be insolvent in his circumstances.(b) Nor is the possession of his late property by an insolvent debtor, who has, *bona fide*, assigned all his effects for the use of his creditors, to be considered evidence of fraud, if such possession be continued at the request, and for the benefit of the assignees, who use all reasonable diligence to get the possession into their own hands.(c) And a sale of chattels made, and expressed to be, as security for a debt, due to the vendee, although they remain in the possession and use of the vendor, will not be considered fraudulent, as against creditors ; for such a possession and use is consistent with the contract, which is a mere *mortgage* of personal property.(d) And where a bill of sale was absolute, and unconditional upon the face of it, but was, in fact, intended by the parties to secure the vendee as an indorser of a promissory note for the vendor, and possession is delivered to the vendee, the sale would not be considered fraudulent, as to the goods actually delivered, though some part of the goods sold may be left or delivered into the custody of the vendor.—Those remaining with the vendor might, under these circumstances, be liable to execution, but it will not render the resi-

(u) 9 id. 337.

(v) 7 id. 161.

(w) 9 id. 197.

(x) 8 id. 446.

(y) 12 id. 320.

(z) 9 id. 135.

(a) 2 id. 418.

(b) 5 John. 335. 3 Caines, 222.  
3 John. 71. 5 id. 412. 15 id. 571.

(c) 1 John. cas. 156.

(d) 5 John. 258.

due, which were delivered to the vendee, so liable.(e) But where I assign my property to you, in trust to pay my debt to A; and also, to pay and distribute among my other creditors, upon the *condition* that they shall release their demands against me, and if any of them should refuse to do so, then to pay such particular creditors as I shall appoint—C and D, two of my creditors, refuse to accede to these terms—my property, thus in your hands, is thereby rendered liable to be seized and taken in execution; for, upon any of my creditors refusing, the right to the property results to me.(f) Yet an assignment of property to pay debts, with a power of revocation, is void as it respects *creditors only*, or those seeking to obtain their debts; and a reservation, in such an assignment, for the maintenance of the assignor, does not render the whole assignment void, though in case of deficiency, the creditors may take the part reserved.(g)

If I purchase goods fraudulently, without paying for them, in order to subject them to an execution against me, the property does not pass to me, and, consequently, they cannot be taken in execution, as my goods.(h)

If goods seized by a constable on execution, are claimed as belonging to some one, other than the debtor, it is doubtful whether he has a right to summon a jury, and try the right to the property; but if he have such right, and the jury find the property belonging to the claimant, the inquisition will merely have the effect of authorizing the constable to return upon the execution, that no goods can be found; and will not protect him (should the jury find against the claimant,) from an action of trespass for the goods at the suit of the claimant, though it will mitigate the damages in such suit.(i) Nor, should the jury find in favour of the claimant, would this protect him in returning *no goods found*, if the creditor offer him good indemnity against the consequences of selling. In such case, he must still go on and sell, though the inquisition be against him, if there be any possible cause of doubt respecting the title to the property.(j)—And, indeed, according to the case last cited, where an adequate indemnity is offered, the constable is bound to proceed and sell.(k) The constable should always require this security for indemnity, where there is reasonable cause of doubt as to the title of the goods; and this, more especially, because the law will not imply any promise of indemnity from the creditor;(l) and he would, otherwise, be without any remedy, except the mere re-

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(e) 17 id. 102.

(f) 14 id. 458.

(g) 15 id. 571.

(h) id. 147.

(i) 10 id. 98, 15 id. 147.

(j) 15 id. 157.

(k) Vide id. 151, per Van Ness, J.

(l) 1 Campb. Rep. 343. 2 id. 452, & vide ante, 80.

covery back of the money which he pays over to the creditor, upon a sale of the wrong goods, where their value is recovered by the owner against him.(m)

*Form of bond to indemnify constable in selling goods on execution.*

Know all men by these presents, that we, *James Jackson* and *John Doe*, are held and firmly bound unto *Thomas Noakes*, a constable of the county of *Saratoga*, in the penal sum of 200 dollars, (*double the value of the goods*) to be paid to the said *Thomas Noakes*, or to his certain attorney, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 1st day of October, A. D. 1820.

Whereas the said *Thomas Noakes*, as constable as aforesaid, by virtue of a certain execution, issued by *Philip Green, Esq.* one of the justices of the peace of the said county, against *Richard Roe*, in favour of the said *James Jackson*, for 55 dollars, hath seized, or is about to levy the same execution, upon one certain bay horse, with a waggon and harness, now, or lately in possession of the said *Richard Roe*, with intent to sell the same, in order to satisfy the said execution; now, therefore, the condition of this obligation is such, that if the said *James Jackson* shall, at all times, and forever hereafter, keep the said *Thomas Noakes* harmless and indemnified of, from and against all damages, costs, charges, trouble and expense, of what nature soever, which he may be put to, sustain or suffer, by reason of such levy and sale, or either, then this obligation to be void, or otherwise of force.

*James Jackson.* (L. S.)

*John Doe.* (L. S.)

Sealed and delivered, in  
presence of A. B.

This bond, or other contract of indemnity, will be valid and binding, wherever there is the least possible doubt as to the title to the goods, though where there is no pretence to seize them, but all parties, including the constable, must know that they are wrongdoers, no indemnity can bind: For an engagement to indemnify a man for what he must of necessity know to be a trespass, is upon an illegal consideration, and, therefore, void.(n)

If, after diligent inquiry, no goods can be found, the constable is blameless, even though there be, in fact, goods and chat-



tels sufficient. Accordingly, in an action against him for the neglect, he may show in his defence, an inquiry of the neighbours, or other proper persons, with their answers, touching the goods, as well as other acts of his, in searching for property, for this goes to negative the charge of negligence.(o)

If the goods levied upon, either by a sheriff or constable, lie without sale an unreasonable time, in the defendant's possession, with the consent of the plaintiff, the levy is void, and the goods subjected to a junior execution ;(p) as where the sheriff levied upon goods, and, with the plaintiff's assent, suffered them thus to lie for one whole year.(q) And the mere act of levying goods levied on, in the possession of the defendant, is, when unexplained, *prima facie*, evidence of fraud.(r) But if all the possession is taken, of which the thing is capable, or conveniently susceptible, this is enough; as of standing corn, which may be left in the field, or ponderous articles which may remain with the defendant, till a sale.(s) And though goods levied upon, are left with the defendant, and suffered to lie an unreasonable time before sale, yet if they are in fact sold to a *bona fide* purchaser, a junior execution cannot then take them.(t)

In these cases of conflicting executions, if the constable, who made the first levy, sue the constable, who made the second levy, under the junior execution, the latter may, in his defence, show fraud in the first judgment and execution, equally, as if the creditor upon the first execution, had himself been plaintiff.(u)

The rule is, that wherever the senior execution, or the levy thereupon, is fraudulent, a junior execution may take the goods levied upon, and the first execution utterly loses its priority, and is considered as void, and of no effect, from whatever court it issued. We have already noticed some of the cases, decided upon this principle. Fraud, being, in general, not susceptible of positive proof, its very nature presupposing concealment, the law seizes on certain *indicia*, which usually accompany an intention to deceive, and considers them, unless very fully explained, as equivalent to proof of actual fraud.— Besides, it is unreasonable that one creditor, who has levied upon goods, should use his priority to the delay or injury of others, seeking the same remedy. He ought, therefore, to conclude the concern by a sale in a reasonable time, or lose his

(o) 1 Con. Rep. N. S. 387.

(p) 11 John. 110.

(q) *id.*

(r) 15 id. 430.

(s) Vide 2 id. 418. 15 id. 428.

(t) 14 id. 222.

(u) 15 id. 428.

priority. Pursuant to these principles, in addition to the cases already mentioned, it has been decided, that an execution loses its priority in the following cases : Where the plaintiff instructs the sheriff to delay the execution after seizure, or agrees to let the execution sleep in the sheriff's hands ; (8 John. 20.) When the creditor consents to leave the goods in the possession of the defendant, without a receptor, who goes on and uses them as before ; (11 John. 110,) or where he leaves them in the defendant's possession, without a receptor, whether the defendant use them or not. (*id.*) Where the creditor gets the sheriff to levy, but will not suffer him to proceed further, leaving the defendant in possession. (7 Mod. 37.)—Where the owner, after levy, is to keep possession on certain terms. (*Prec. in ch.* 286.) Where the plaintiff's attorney tells the sheriff to use the defendant kindly, and not take any of his household goods, for another will shortly pay the debt ; and the sheriff levies, leaving the goods with the defendant. (1 Wils. 44.) Where the party tells the sheriff, on delivering the execution, " you may let it lie, it requires no haste." (5 Mod. 376.) Where the creditor gives the debtor permission to use part of the property levied on ; (15 John. 423,) or permit provisions levied on, to remain with the debtor, and be consumed by his family. (*id.* 429) Where the plaintiff gives his execution to the sheriff, telling him to make a levy, but do nothing till ordered, unless crowded by younger executions, but by no means to let his execution lose its preference, and the sheriff pursues such instructions. (17 John. 274.)

Where there has been no delay, we have seen ante, 221 to 225, that the first levy binds. And we noticed ante, page 223, that though such senior execution takes preference, yet, if the sheriff, having both executions, sell on the junior one, the sale is valid, and the plaintiff, in the senior execution, must look to the sheriff. This last rule is also recognized in 18 John. 311. It is also settled, by the case at the page last quoted, that after a *fi. fa.* delivered to a sheriff, though before it is actually levied, the act of the defendant in removing the goods into another county, where they are sold under another execution, is a violation of the rights of the sheriff, who received the first execution, for which he might maintain an action against the defendant ; and further, that such act of the defendant, in removing the goods, will not deprive the plaintiff in the first execution of his remedy ; but the sheriff will be ordered to pay him the money levied by the second execution. How far a delivery of a *fi. fa.* to the sheriff, binds personal property, and renders a sale thereof by the debtor void, vide ante, 222. 18 John. 363. S. P.

The constable cannot justify breaking open the outer door of the dwelling house of the defendant, in search either of his

goods or the goods of any of his family, who are defendants ; and this includes his servants and lodgers, where the execution is against any of them. The house is a protection for them all.(v) But my dwelling house will not protect the goods of a stranger, (i. e. one not of my family.) And after demand and refusal, it may be broken to seize them.(w) Accordingly, where the constable finds the outer door of the defendant's dwelling house shut, he should not open it ; but if that be open, he may, if necessary, break open an inner door, even without first demanding admittance.(x) Goods may be taken through the windows of a dwelling house, if open, though the outer door be shut.

But this question of local privilege, was so fully considered ante, 278 and 279, that I shall content myself with referring to those pages, with the remark, that the privilege of goods, from the circumstance of their being in a dwelling house, stands, in all respects, on the same footing, with that of the person.

A seizure of part of the goods, in a dwelling house, in the name of the whole, is a good seizure of all. The execution must be levied, before the return-day, and the constable ought to make an inventory of the goods, in order to complete the levy. This, however, is not strictly necessary ; but he should at any rate, have the goods within his view, and under his power, before they can be said to be levied on ; for merely seizing a few goods, out side of a store, or ware house, and proclaiming a levy on all the goods locked up in the place, but not within view, will not constitute a levy upon them, but the constable should break open the store, and take an inventory.(y)

The constable cannot pay the plaintiff with his own money, and levy, or retain the levy under the execution, even though the defendant agree with him, that this may be done, for the constable's security, where the money is raised on their joint credit.(z)

If goods are levied upon by one execution, upon a subsequent one being given to the same constable, the goods levied upon by the first, are bound by it, without any actual levy under the second execution.(a)

(v) 13 Mass. Rep. 520.

(y) Vide 16 John. 287.

(w) 5 Co. 93. a. 13 Mass. Rep. 520.

(z) id. 443.

(x) Cowp. 1. 5 John. 352. 4 Taunt. 618.

(a) 7 Taunt. Rep. 56.

Upon seizing the goods, the constable should either take them into his actual custody, or deliver them to some responsible receptor. He is under no obligation to do the latter, though this is generally done where a proper person offers to receive them. Upon thus parting with the possession, he should be careful to take the proper written acknowledgment, with a promise to re-deliver them.

*Form of a receipt of goods levied upon by an execution.*

JUSTICE'S COURT.

James Jackson,

v.

Richard Roe.

Execution issued by Philip Green, Esq. one of the justices of the peace of the county of Saratoga, for	- - -	25,00
Constable's fees for collecting,	- - -	2,00

\$27,00

Under the execution above described, *Thomas Noakes*, one of the constables of the said county, has levied upon the following goods and chattels, viz.

19 Windsor chairs, worth \$1 each,	- - -	\$19,00
2 Looking glasses, worth \$10 each,	- - -	20,00
1 Dining table,	- - -	10,00

\$49,00

October 2d, 1820. Received of the said *Thomas Noakes*, the goods and chattels above mentioned, which I promise to deliver to him, at any time when he shall demand the same, at the dwelling house of the above named *Richard Roe*, in the town of Saratoga Springs, in the said county, or in default thereof, I do hereby agree with the said *Thomas Noakes*, to pay him the amount of the above mentioned judgment, as the same is above specified, together with the above mentioned fees for the collection thereof.

*John Doe.*

If the constable prefer it, he can specify, in this receipt, the precise time, as well as place of delivery, or he may omit both as suits him, for if he parts with the possession, he is to be accommodated as to terms. Having once levied on sufficient to satisfy the execution, the constable cannot make a second levy; for the judgment is considered discharged by the first. And it is the same in effect, if the property levied on, be altogether insufficient, provided the constable take security for the debt in



the above or any other form. (b) He should, for this reason, be very careful who he takes as receiptor. And he should, moreover, be sure to levy and sell within the life of the execution ; for, if he let the execution sleep, and pay the money to the plaintiff himself, without making any demand upon the defendant, he cannot even maintain a suit against the defendant, for the money so paid. (c) And whether such demand, and payment afterwards, *without* the defendant's request, will sustain an action against him, is very questionable. (d) On this subject, vide ante, 79. An actual levy must be made, in order to vest a property in, and enable the constable to maintain an action for the goods ; (e) and the priority of the execution depends on its actual levy, and not on the time when it came to the constable's hands. (f) That this is the case with all executions, and other proceedings in the nature of an execution, we inferred at large, ante, 221 to 225.

Having levied, which must be within twenty days from the receipt of the execution, (g) he must immediately advertise and sell within the time limited for the return of the execution. And it is enough to save the lien, provided the advertisement be in sufficient season to sell at any time before the return-day. (h) But no sale can take place afterwards, unless the execution be renewed, (i) which would of course, discharge the lien of the first. Indeed, a renewal would be improper, where sufficient goods were found on the first execution. (j)

If the goods are receipted, to be delivered on demand, they must be demanded within the life of the execution, or the receiptor is discharged, he being considered by the law a mere naked bailee ; (k) and there being, in this case, no precedent debt or duty, a demand is essential to create it. (l) And even the alternative of paying the debt, in default of delivering the goods on demand, could not of course be enforced, without a demand in due season. If the goods turn out to be the property of a third person, the receiptor is discharged wholly of his obligation, for there is then no consideration for his promise ; the constable is also discharged, of course ; and so if the title fail as to part of the goods, he is discharged as to them. (m)

(b) 12 John. 297.

(c) 3 id. 474. 8 id. 436.

(d) 10 id. 361. id. 404. Ante, 79.

(e) 12 John. 403.

(f) 13 id. 249.

(g) 1 N. R. L. 396, s. 14, & vide 13 John. 249, 251, per Yates, J.

(h) 13 John. 251, per Yates, J.

(i) id. Vide 1 N. R. L. 396, s. 14.

(j) 1 N. R. L. 393, s. 11, & vide

12 John. 322, per Yates, J.

(k) 9 John. 361.

(l) id. and vide ante, 484, 5.

(m) 12 Mass. Rep. 163. 13 id. 224. 4 id. 498.

After taking the goods and chattels, the next step is to advertise them for sale. This must be done in the city or town where they are taken. An advertisement should describe the goods and chattels taken, with the time and place of sale, and be fixed up in three publick places of such city or town, five days before the day of sale. This being a notice, we must, according to the principle laid down, ante. 143, compute the time of the notice exclusive of the day of affixing it; and a notice of sale on Monday, must run, at least, till the next Friday.

*Form of the constable's advertisement of sale.*

By virtue of an execution, I have seized and taken 19 Windsor chairs, 2 looking glasses, and one dining table, the goods and chattels of *Richard Roe*, which I shall expose to sale at publick vendue, to the highest bidder, on the 25th day of October instant, at 10 o'clock A. M. at the inn of J. D. in the village of Saratoga Springs. Dated October 20th, 1820.

*Thomas Noakes, constable.*

The goods and chattels levied on, must be present and pointed out at the time of sale, or no property in them will pass to the purchaser.(n) The constable's authority over the property ceases, on the execution being returned satisfied, so that he cannot, then, remedy any defect in the first sale, by re-selling, assigning or deeding the property over again.(o) A general sale of *all the personal property* of the defendant, or the *residue* of his personal property, is a nullity, and will not carry the title of the goods, for the property, in order to pass it, must be pointed out specifically, and sold in separate parcels.(p) Yet, if part of the property be present and proclaimed, though property which is absent, be set up for sale in the same parcel, that which is present will pass, while the title to the absent property remains unchanged.(q) A sale upon an execution, will pass no greater title to the purchaser, than the defendant in the execution has to the same property.(r) But where the constable seizes and sells your property on an execution against me, the law adjudges it legally and peaceably in the hands of a mere purchaser, who had no hand in the original seizure; and in such a case, before an action of trover, will lie for the property, you must demand it of the purchaser.(s)

(n) Vide 1 N. R. L. 394, s. 12.  
1 John. cas. 284. 14 John. 222. 17  
John. 116.

(o) 1 John. cas. 284.

(p) 14 John. 352. 1 John. Chy  
cas. 502.

(q) id. 222.

(r) 8 John. 333.

(s) 6 id. 44.

The proper course for the constable is, to sell so much property only as will satisfy the execution, and which can conveniently and reasonably be sold separately. (t)

If a constable, having several executions against the same property, sell the whole on a junior execution, yet the sale is valid, and passes a good title to the purchaser, and the only remedy for the plaintiff in the senior execution, is by suit against the constable for the mal-feasance. (u)

A constable's sale may be adjourned to a different time and place, even after it has commenced. (v) But by statute, sess. 43, ch. 159, s. 3, a constable may not take, nor agree to take any reward of the party, or any other person for postponing the sale under an execution, upon pain of fine and imprisonment, as for a misdemeanor.

On a sale at auction, the bargain is not struck, till the article is knocked down, until which the bid, being a mere proposition, may be withdrawn. But when the article is knocked down, if the bidder do not receive it, and pay the money, the article may be sold again, and the bidder is liable to pay the constable the loss upon the second sale, or the constable may prosecute an action against the purchaser, for goods bargained and sold. (w)

Among our remaining remarks, on the subject of levy and sale, will be found several, which go upon the supposition, that a constable has a right, as remarked, ante. 655, to sell terms for years. Should the expected decision, there mentioned negative this right, still these remarks will be of use in directing proceedings on executing upon a justice's judgment recorded, and made a lien upon real estate.

If the sale be of a term of years, the constable must execute an assignment, or note in writing, of the sale, signed by himself and the purchaser, for otherwise, the sale is void by the statute of frauds. (x) And, for the same reason, perhaps where a single bid for goods amounts to 25 dollars or upwards, the requisitions of the statute of frauds should be complied with by a note in writing, earnest or part delivery, as we mentioned ante, 28, 29, 30, in regard to private sales.

In assigning a term for years, a recital of the execution is not necessary; and even a mistake where a recital is attempted,

(t) 8 id. 333.  
(u) 12 John. 162. 13 John. 311,  
S. P. Ante, 223.  
(v) 5 id. 345.

(w) Ante, 54, 5. 1 H. Bl. 81.  
(x) 1 N. R. L. 78, s. 9, 10, 11.  
2 Caines, 61. Ante, 148.

will not prejudice.(y) Nor is it necessary to state in the assignment, the particular interest which the defendant has in the term, for the officer may not be able to find this out. It is enough, therefore, to say that he is possessed of a term of years yet to come, and unexpired, and to assign all his interest therein, generally.(z) It is much more prudent to state the interest in this way; for, if the assignment undertake to state it correctly, and fail, the purchaser has not a good title.(4 Co. 74. Cro. Eliz. 584, S. C. 3 T. R. 294.)

A title to a term of years thus acquired, is valid, though the execution be returned incorrectly; for the title is derived from the sale and assignment, and not the return.(a) The purchaser becomes tenant, instead of the defendant, and succeeds to all his rights and liabilities as such, among the latter of which, is the obligation to pay rent to the landlord.(b) But no title passes on a sale of any kind of property, either real or personal, where the officer acts without the proper authority;(c) and accordingly, in an action brought by the purchaser of property, at a sheriff's or constable's sale, either against the defendant, or any other person, the plaintiff must prove the judgment and execution, in some of the ways noticed ante, 561 to 566, which must then be followed up by a proof of the assignment or other proper evidence of sale, according to the nature and amount of the property sold.(d) The defendant will have no right to question the regularity of the execution, on the ground that the amount disagrees with the judgment, and the like;(e) and a sale to a *bona fide* purchaser will be valid and binding, even though the officer might have made no previous levy.(f)

On a sale of a term for years, the purchaser may enter, and take possession immediately, if he can do it in a peaceable manner, and it is no objection, that some goods of the former tenant remain on the premises, and which are, also, occasionally occupied by his servant.(g) But generally, in order to warrant an immediate entry, they should be vacant: the officer can only deliver the legal possession; and the purchaser must bring an ejectment to obtain actual possession;(h) and, indeed, the officer can, in no case, put the tenant out of his actual possession, and deliver possession to the vendee, without the consent of the former.(i) But, if the tenant will consent, and depart in a peaceable manner, the officer may then place the vendee in the actual possession of the premises.(j)

(y) 10 John. 361.

(z) 4 Co. 74. Cro. Eliz. 584. S. C.

(a) 1 John. cas. 153. 1 John. 45, S. C. in note.

(b) 3 Caines, 188.

(c) 7 John. 535.

(d) 12 id. 213.

(e) 8 id. 361.

(f) 13 id. 97.

(g) 1 John. 42.

(h) 13 id. 340.

(i) 2 Show. 85.

(j) 3 T. R. 292.



*Form of an assignment of a term for years by a constable.*

To all, to whom these presents shall come, I, *Thomas Noakes*, one of the constables of the county of *Saratoga*, send greeting : Whereas, by virtue of an execution, issued by *Philip Green*, Esq. one of the justices of the peace of the said county, directed to any constable within the same county, and to me delivered, dated the second day of October, A. D. 1820, against the goods and chattels of *Richard Roe*, and in favour of *James Jackson*, for 25 dollars damages and costs, I did, within twenty days after the date thereof, levy upon, and before the return day thereof, did sell, at public auction, to *James Denn*, for the consideration of 50 dollars, bid by him for the same, a certain term of years yet to come and unexpired, of and in all that lot, &c. (*describing the premises*), with the appurtenances, whereof the said *Richard Roe* was possessed : Now, know YE, that, for the consideration of 50 dollars to me paid, I do hereby sell, assign and set over to the said *James Denn*, all the right, title and interest of the said *Richard Roe*, of, in and to the said term, with the appurtenances, to have and to hold, the same to the said *James Denn*, his executors, administrators and assigns, as fully as I have power to do in virtue of the said execution and sale, or otherwise howsoever. In witness whereof, I have hereunto set my hand and seal, the 1st day of November, A. D. 1820.

*Thomas Noakes.* (L. S.)

Sealed and delivered,  
in presence of A B.

*Form of a memorandum of sale of personal chattels.*

## JUSTICE'S COURT.

*James Jackson*,  
v. } Before *Philip Green*, Esq. Justice.  
*Richard Roe*. }

November 1, 1820, *James Denn* bought of *Thomas Noakes*, constable, at auction, on an execution issued in this cause,

1 Feather bed, - - - - - \$25.

1 Horse, - - - - - 50.

\$75.

*Thomas Noakes.*

*James Denn.*

The constable should be careful, if the defendant be a tenant and owe rent to his landlord, not to remove the goods until one year's rent is paid. This is made his duty by statute ;(k) and

if he violate it, he is accountable to the landlord in an action on the case, *(l)* at the suit of the landlord or his representatives. *(m)* But he must first have notice, that the rent is due ; *(n)* and then, though the statute speaks of a removal of the goods only, yet a sale thereof is considered equivalent to a removal, and the constable is thereupon liable immediately. *(o)* If the plaintiff pay the rent, the constable may then levy both the rent and the sum due upon the execution, the lien for the rent being thus transferred from the landlord to the creditor upon the execution, or he may sell and, first paying the landlord his rent, pay over the residue to the plaintiff, who is entitled, in an action against the constable, to recover the balance only, remaining in his hands. *(p)* And when the goods are not sold or removed so as to transfer the property in them, but the defendant pays the execution, no action lies, though the landlord may have given notice and made demand. *(q)* The landlord cannot distrain the goods, nor can a collector take them for taxes due from the defendant, after they are levied on by the execution, for they are then in the custody of the law. *(r)* Nor can the landlord claim any rent, save that only which is due at the time of the levy, but not rent which falls due afterwards, between the time of the levy and sale, though the whole be less than a year's rent. *(1)*

When the constable fails in finding sufficient goods or chattels to satisfy the execution, he is then to take the body of the defendant, and convey him to gaol. The privilege from arrest on an execution, is the same as that on a warrant, to which we gave a very full consideration, ante, 277 to 279, under the heads of *personal, temporary and local privilege*, and the rights and duties of the constable as to making the arrest, and his conduct after it is made, is, in general, the same as we noticed in relation to an arrest upon a warrant, ante, 279, 80. Thus, a person attending as a witness, has been holden privileged from an arrest on *ca. sa.* *(s)* So, one who attends as a party. *(t)* And although attorneys, counsellors, and other officers of the higher courts, were always liable to be taken in execution ; yet, if attending court on business, they may be discharged from such arrest by the court ; and so, they may be discharged by a judge at the circuit or sittings. But they are thus relievable from arrest, only on motion, and under the circumstances of the case ; and a sheriff or constable, having them in custody on a *ca. sa.* or other execution, cannot discharge them, even though they pro-

*(l)* Ante, 196.

*(m)* 1 Str. 212.

*(n)* id.

*(o)* Barnes, 211.

*(p)* 1 N. R. L. 437, s. 12. 12 John. 379.

*(q)* Woodf. L. & T. 565.

*(r)* 17 John. 128.

*(s)* 18 id. 1.

*(t)* 4 Dall. 368. 10 John. 93.

*(1)* 4 Dall. 389, per Peter's J. 12 John. 93.

duce their writ of privilege, but must await the order of the court ;(u) and if they are discharged without this order, the officer is liable, as for an escape.(v) But, generally, in other cases of privilege, they may discharge without such order.(w) And, accordingly, where the constable took the defendant in execution, who was privileged as a soldier of the United States, (x) it was holden that he might discharge the defendant of his own head, and that no action lay against him.(y) It is moreover, provided by statute, 1 N. R. L. 527, s. 31, "that no female person shall be imprisoned upon execution, in any civil action for debt or damages, hereafter to be brought in any court whatsoever, in which the debt or damages recovered, shall not, exclusive of costs, amount to more than 50 dollars."

The plaintiff may, if he pleases, direct the constable to take security for the debt, rather than carry to gaol ; and where the constable, under such a direction, took a promise from a third person, endorsed on the execution in these words, "*I promise to pay the amount of this execution, in the life, value received ;*" it was holden a valid promise to pay the execution to the plaintiff, whether the defendant knew of the authority or not, and that the words "*value received*" imported, *prima facie*, a sufficient consideration.(z)

On making the arrest, the defendant. (unless he pay the money) is to be carried to the keeper of the common gaol who is bound to receive and keep him, till duly discharged. The term of this imprisonment, depends on the statute.(1 N. R. L. 394, s. 12.) If the prisoner be a man of a family, and not a freeholder, it is 30 days— 60 days, where he has neither family nor freehold. If a freeholder, he must remain till the demand is paid. Before entitled to his discharge, in the two first instances, he must make affidavit before a justice of the Supreme Court, a commissioner for taking affidavits to be read therein, a judge of the Common Pleas, or some justice of the peace, in the presence of the sheriff, one of his deputies or the gaoler, that he comes within the provisions of the act. (For further particulars, vide the act.)

*Form of an affidavit to discharge a prisoner, after a confinement of thirty days.*

SARATOGA COUNTY, ss.

Richard Roe, being sworn, saith, that he has remained imprisoned, in the gaol (or on the liberties of the gaol) of the coun-

(u) 18 John. 52.

(v) id.

(w) 10 id. 93.

(x) Ante, 277, 3.

(y) 11 John. 433.

(z) 14 id. 466.

ty of Saratoga, under and by virtue of an execution issued by *Philip Green*, Esq. one of the justices of the peace of the said county. upon a judgment rendered by him for 25 dollars, in favour of *James Jackson*, against this deponent, for more than thirty days; and, that, at the time of the rendition of the said judgment, he, this deponent, had and from thence hitherto has had, and still has, a family in this state, and, that during all the time aforesaid, he was not, nor is he now, a freeholder.

*Richard Roe.*

Sworn the 3d November, 1820,  
before me, A B, justice of the peace.

If a single man, and not a freeholder, say, "sixty" instead of "thirty" days, and add as follows: "And, that, at the time of the rendition of the said judgment, he was not, and from thence hitherto, has not been, and is not now, a freeholder.

On delivering this affidavit to the sheriff or gaoler, he is bound to discharge the prisoner, and cannot object, that he has sworn falsely, though this be the case, within the knowledge of the sheriff or gaoler; for the affidavit operates as a complete protection against any action for the escape, brought either against the sheriff or the bail for the gaol liberties, whether it be true or false; and the party is left to his remedy against the debtor. If he has sworn false, he is liable to an indictment and conviction for perjury; and may then be re-imprisoned. But this discharge does not at all prejudice the right to another execution against the goods and chattels of the prisoner. (a) The above provisions of the 25 dollar act, on the subject of imprisonment, all extend to imprisonment under the 50 dollar act. (b) And accordingly, where a man is not a freeholder and a man of a family, he can be imprisoned but thirty days, though the judgment be an hundred dollars. (15 John. 397.)

A justice, as such, has no authority to discharge a prisoner in execution; and, if a constable discharge him by order of the justice, he is, notwithstanding, liable for the escape. (c) Nor, has an attorney, retained merely to prosecute the suit, any power to grant such discharge. (d) A plaintiff in a *qui tam* action, cannot discharge the defendant from execution, merely on payment of the plaintiff's share, without the other moiety. Such discharge would be no protection to the constable. (e)

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(a) Vide 1 N. R. L. 394, 5, s. 12. 11 John. 474. (d) 8 id. 361. 10 id. 220, & vide 6 id. 51.  
(b) 15 John. 397. (e) 11 id. 474.  
(c) 9 id. 146.



*Form of constable's return to an execution.*

I have levied the within sum, of the goods and chattels of the within *Richard Roe*, as I am within commanded. Levied of goods and chattels.

I have levied ten dollars, parcel of the sum within mentioned, of the goods and chattels of the within *Richard Roe*, and, no goods or chattels being found, whereof I could levy the residue thereof, I have committed his body to the common gaol, as I am within commanded. Part levied of goods, &c. and commitment for residue.

No sufficient goods or chattels of the within *Richard Roe* could be found whereon to levy; I, therefore, took and conveyed his body to the common gaol, as I am within commanded. Commitment generally.

I could not find either property or body, according to the command of the within precept. No property nor body.

Add the proper date and signature of the constable.

By an act, passed March 31, 1821, s. 1, it is provided, "That whenever any execution shall be issued for the collection of any judgment, rendered after the first day of June next, (1821,) for any of the penalties incurred, under any of the acts mentioned in the act, entitled, "an act to require overseers of the poor to sue for penalties incurred under certain penal statutes," passed February 18th, 1820, it shall be the duty of the justice issuing the same, to state in the body of the execution, or endorse thereon, briefly, the cause for which such judgment was rendered, and thereupon the defendant, in such execution, shall, in case no goods or chattels can be found to satisfy the same, forthwith be committed to the common gaol of the county, where such judgment is rendered, until such judgment is satisfied, and not be entitled to have the liberties of the gaol limits; provided, however, that the whole time of the imprisonment of any such person, shall not exceed ninety days."

We noticed this subject ante, 348. The act alluded to in the above section, may be found in Laws, sess. 43, ch. 37.

*Form of indorsement under the above provision.*

The cause for which the within mentioned judgment was rendered, was for selling one gill of rum, to be drank in the house of the within named *Richard Roe*, without having such license therefor, as is required, in and by the 3d section of the act, en-

titled, "an act to lay a duty on strong liquors, and for regulating inns and taverns." Dated, &c.

This indorsement must be varied according to the circumstances of each case, and should state substantially the cause of the conviction as contained in the declaration.

The better opinion seems to be, that a constable, sheriff, &c. cannot serve his own execution himself; nor can a plaintiff be deputed to do this. And if a sheriff has not this power himself, whether he can give power by deputation to execute such process in his own name? Quere.(f)

#### SECTION IV.

##### *OF THE ACTION FOR NEGLIGENCE, IN NOT COLLECTING OR SERVING THE EXECUTION, OR FOR SUFFERING AN ESCAPE THEREFROM.*

The action for a negligent non-collection, or non-service of the execution, arises out of the 13th section of the 25 dollar act. (g). The form of declaration we gave ante, 341, 2; and several remarks applicable to this head, may be found in the same pages. And the doctrine, as to what constitutes an arrest upon an execution, is the same as that in relation to a warrant, which note, ante, 181; and the distinction between voluntary and negligent escapes, there noticed, is also applicable here.

If a constable neglect to take the body of a defendant, on an execution, payable by instalments, on the defendant's default in paying the instalment due, he is liable in debt for the whole, the same as in other cases of neglect. This may be gathered from 1 N. R. L. 394, 5, 6, s. 11, 13 and 14.

If the plaintiff consent that the defendant be discharged, or that he go out of the custody of the constable, or off the gaol limits, the judgment is thereby discharged, and the debt forever extinguished, unless, indeed, such consent be obtained fraudulently; (h) but where the debtor has once escaped, the plaintiff's consent that he may remain at large, will not discharge

(f) Vide 4 John. 486. Cro. Car. 416 19 Vinet, 443. note. Moore, 547. Dalton's sheriff, 97. Bac. Ab. tit. sheriff. (m)

(g) 1 N. R. L. 395.  
(h) 13 John. 181.

the judgment, nor protect the officer against an action for the escape.(i)

A voluntary return, or recaption of the prisoner, wherè the escape was not voluntary, constitutes a good defence, if such return or recaption were before suit commenced. For what shall be deemed the commencement of the suit, vide ante, 268, and that a warrant is not such commencement, till served, vide ante, 395. But where the sheriff pleads such return, or fresh suit and recaption, and that the escape was negligent, he must verify it by affidavit, or the plea is a nullity.(j)

The plaintiff, in this action, must prove both the judgment and execution, but it is no defence, that there happens to be a variance between them in amount.(k) The form of the action must be debt, and if, in any other form, the judgment will be reversed.(l)

Although the constable has thirty days, within which to take the body, yet if he do this at any time before the return day of the execution, and let the defendant go at large, it is a voluntary escape, and the constable is liable for the debt, though the defendant agree to return within the thirty days. In the case which decides this, the action was commenced against the constable, while the defendant was at large; but it is conceived that it would make no difference, whether brought before or after return and commitment; for it is settled, that a voluntary escape cannot be purged by a return and recaption; the officer has no right to detain his former prisoner.(m) It is the duty of the officer, on arresting the prisoner, to convey him, on such route as shall seem to him the best and safest, directly to gaol, and it is said, that if he go a great way round to accommodate the prisoner, it is an escape.(1 Mod. 116.) So, if the prisoner go back, &c.(id.)

In an action against the sheriff for an escape, though the plaintiff declare expressly for an escape from the gaol liberties, it is sufficient, *prima facie*, to sustain the action, for him to prove that the prisoner was at large, walking the streets, or at a tavern in the neighborhood of the gaol, or the like; and it then lies upon the defendant to show the gaol liberties, and that they encompassed the place where the prisoner was seen at large.(n)

(i) id.

(j) 1 N. R. L. 426. 16 John.

307.

(k) 5 John. 89.

(l) 13 id. 191.

(m) id. 503, & vide ante, 181.

(n) 7 John. 165.

In an action of debt against the constable for negligence, or for an escape, he is not liable for interest on the sum demanded, but only the simple amount of the execution ; for the debt is in the nature of a penalty.(o) And so of an action of debt for an escape against the sheriff.(p) The plaintiff is, however, entitled to recover, as a part of the debt, the poundage and other fees for serving the execution ; for he would have a right to recover this in an action of debt on the judgment, against the defendant, who escaped.(q) But if the plaintiff bring an action on the case, as he has a right to do, he may then recover his interest, as well as the debt, provided he make so much damages appear, and he may also be limited to his actual damages, which may fall short of the debt.(r)

An action lies against the officer, for falsely returning "no goods found," even after the defendant is taken and imprisoned on execution in the same cause.(1)

Where the constable gave security in the usual form, but the seal was omitted, and having become liable for executions in his hands, absconded, upon which his bail, supposing themselves liable, gave their notes for part of the claim ; in an action on the notes, the want of a seal to the article of surety is no defence ; for the defendants must be presumed to have known all the circumstances ; and having voluntarily executed the notes, it is a waiver of all objections to the form of the original security.(s)

Where an officer has an execution to collect, he may forbear to arrest the defendant, or take his goods ; and instead thereof he may take the defendant's note or other security for the debt ; and, if this be afterwards approved of by the plaintiff, the note is valid, though he have no *previous* authority to do this ; and it would be the same in effect, though he should release the defendant's goods, or his person from arrest, and take such security, if afterwards approved of by the plaintiff ; and I think all this is clearly deducible from the case of *Sugars v. Brinkworth*.(t)

Although the plaintiff may have recovered judgment, or is proceeding to judgment against the sheriff for an escape from execution, yet this does not preclude his taking out further execution against the defendant's property or body. And of this he is not barred, till he receive actual satisfaction of his debt

(o) 14 id. 255.

(p) 2 John. 45. W. Bl. 1048.

(q) 2 T. R. 126. 7 Mass. Rep.

377.

(r) 2 John. 45.

(1) 1 Campb. Rep. 323.

(s) 14 John. 401.

(t) 4 Campb. Rep. 46.



from one or the other.(w) But it seems the rule would be otherwise, in regard to an action of debt against a constable.(x)

Where the constable suffers a voluntary escape, in consequence of which he is obliged to pay the debt, yet he cannot recover over against the defendant,(y) unless, indeed, upon a subsequent promise to pay after the escape.(z)

Actions are frequently brought for money, which constables are liable to pay on account of executions in their hands, against the constable and his sureties required of him by the act, 2 N. R. L. 126, s. 1. This is an action of covenant. In other respects, the proceedings, evidence, and defence are substantially the same, as in an action prosecuted directly, against the constable.

*Form of security to be given by a constable.*

We, *Thomas Noakes*, chosen a constable in the town of *Saratoga Springs*, in the county of *Saratoga*, and *James Denn* and *Richard Fenn*, do hereby, jointly and severally, agree to pay to each and every person, such sum of money, as the said constable shall become liable to pay, for or on account of any execution, which shall be delivered to him for collection. Witness our hands and seals, the 10th day of April, 1820.

Sealed and delivered, in  
presence of A B, Su-  
pervisor of said town.

*Thomas Noakes*, (L. S.)  
*James Denn*, (L. S.)  
*Richard Fenn*, (L. S.)

In taking this security, the form thereof, as prescribed by the statute, must be strictly pursued ; and when the instrument contains any provision not required or authorized by the act, it is void ; as if it should contain a covenant, that the constable should discharge all his duties as constable, instead of the above form, which relates to certain duties only, under executions in his hands.(1)

(w) 1 N. R. L. 426. 8 John. 361.  
(x) 14 John. 362.  
(y) 14 John. 362. Ante, 79.

(z) id. 478.  
(1) 1 Penn. Rep. 115. id. 120.

## CHAPTER XVI.

### OF CERTIORARI AND APPEAL.

As the proceedings in both these cases must, of necessity, be in the main, conducted by gentlemen of the legal profession, whose books of practice contain the proper directions in this department, I shall confine myself on this head to such particulars only, as relate to the official duty of the magistrate, and the effect of the certiorari and appeal upon the execution in the cause.

#### SECTION I.

#### OF CERTIORARI.

1. In all cases under the 25 dollar act, and when the judgment rendered, does not exceed 25 dollars, if the suit be brought under the 50 dollar act, or where no issue is joined under the 50 dollar act, be the amount as it may, the method of reviewing and correcting the errors which may have intervened in the proceedings before the justice, is, by writ of *certiorari*.<sup>(a)</sup> And so, where the cause is determined in the court below, upon demurrer or an issue in law, the party has no right to appeal, though the judgment exceed 25 dollars, and is rendered under the 50 dollar act ; but the remedy is by *certiorari* only. The statute, (sess. 41, ch. 94, s. 17.) which gives the right of appeal from a judgment, rendered where an issue is joined, means an issue of *fact*, which can be tried by a jury, not an issue of law, which must be determined by the justice only.<sup>(b)</sup> Whether a party can avoid a *certiorari* or appeal, by releasing the judgment ? Quere. At any rate, the justice cannot conclude the party by returning this fact ; for this would be going beyond his office.<sup>(c)</sup>

On receiving the writ of *certiorari*, it becomes the immediate duty of the justice to set about making his return ;<sup>(d)</sup> and, although he may wait till the expiration of a rule to compel his

(a) Vide Laws, sess. 41, ch. 94, s. 17.

(b) 18 John. 140.

(c) 14 id. 166.

(d) Vide 15 John. 456. 1 N. R. L. 423. 13 John. 529.

return, of which he must have written notice from the attorney of the plaintiff in error, yet the safer way is to avail himself of his minutes and recollection in the first instance, and this, as well for the sake of justice and accuracy, as because he is liable, not only for any damages arising from a mistake in his return,<sup>(e)</sup> but perhaps, also, for such injury as the party might suffer by the delay.<sup>(f)</sup>

In making the return, the justice is first to indorse the writ as follows :

FORM OF RETURN THEREON,

*Indorsed.*

The execution of this writ appears by the schedule hereunto annexed.

*Philip Green, Justice.*

*Schedule.*

SARATOGA COUNTY, TO WIT:

I — one of the justices of the peace for the county aforesaid, do certify to the justices of the people of the state of New-York, of the Supreme Court of Judicature of the same people, that on — at — in the county aforesaid — in the said writ named, complained before me against — also in the said writ named, of a plea of — to his damage twenty five dollars, and asked of me process on his said complaint : whereupon in pursuance of the authority given to me, in and by the act for the recovery of debts to the value of twenty-five dollars, I issued a summons directed to any constable in the county, commanding him to summon the said defendant to appear before me at — on — to answer the said plaintiff in a plea of — to his damage twenty-five dollars or under, which said summons, on the day mentioned therein for the return, was delivered to me by — one of the constables of the town of — in said county, with an indorsement thereon signed by him, that he personally served the same on the defendant on the — day of —. And I do also certify, that on the said — day of — as well the said plaintiff as the said defendant, appeared before me at — in the said county ; and the said plaintiff declared against the said defendant, (*here insert the declaration,*) and the defendant being called upon to answer the said complaint plead, (*here insert the plea.*) And issue being so joined between the said parties, the plaintiff demanded that the same should be tried by a jury, upon which demand I issued a ven-

(e) 14 John. 195.

(f) 15 id. 456.

ire, directed to any constable of the town of — in the said county, commanding him to summon twelve good and lawful men, being freeholders of such town, and who should be in no wise of kin to the plaintiff or defendant, nor interested in the said suit, to be and appear before me at — in the said town, on — to make a jury for the trial of the action aforesaid, to which said day and place I adjourned the said cause : at which time and place — one of the constables of the said town of — returned the said venire to me, with a pannel containing the names of twelve persons summoned by him for the jury aforesaid.

And I do also certify, that on the day and at the place last aforesaid, the said plaintiff and defendant appeared before me, and the names of the persons so impannelled, being written on ballots and drawn for, as is prescribed by the act aforesaid, six of the persons so impannelled, to wit : — being duly elected, tried and sworn, well and truly to try the matter in difference between the parties aforesaid, and to give a true verdict according to evidence, after hearing the proofs and allegations of the parties which were delivered in publick, in their presence, said upon their oaths, that the said defendant did promise and undertake in manner and form, as the said plaintiff hath complained against him, (*or as the issue may be*) and they assessed the damages of the said plaintiff, by occasion of the premises, over and above his costs, to — : Whereupon I the said justice, in pursuance of the directions of the said act, did then and there adjudge that the said plaintiff recover against the said defendant, the said sum of — by the jury between the said parties as aforesaid, assessed, and also — for his costs in prosecuting his said complaint before me, according to the bill thereof hereto annexed. All which I send with the process, pleadings and other things, touching the aforesaid proceedings and judgment, in as full and ample a manner as the same remain before me, as within I am commanded. Given under my hand and seal this — day of —

— Justice.

The certiorari is accompanied with a copy of the affidavit, on which it is allowed, (g) which states the error complained of, and generally contains matter which the justice would be under no obligation to return, as a part of his proceedings reached by the command of the writ, were they not thus elicited by an affidavit. The above schedule relates to such matters only, as are commanded to be certified by the body of the writ itself ; but it is the farther duty of the justice to annex



this copy of the affidavit to the writ and return, as a part of the *schedule*; and not only so, but he must follow up the above *common schedule*, with a *special one*, answering to the truth or falsity of all the facts stated in the affidavit; that is to say, he must return, that such facts, taking them up singly, are either true or untrue. If he omit to do this, he may be compelled by rule, to amend his return.<sup>(h)</sup> To this end, after concluding the above *common schedule* or *return*, he continues the same by introducing his *special return* as follows :

*Form of continuing a common schedule, by a special one.*

And more especially, as to all the facts stated in the affidavit on which the said writ was procured, a copy whereof is hereto annexed, I do further certify, that on the day and at the place to which the said cause was adjourned as aforesaid, the said defendant did make application to me for a further adjournment of the said cause, upon the ground, and for the reasons as stated in the said annexed copy, but the said defendant did not pretend, on being asked, whether he had made any attempt to procure the attendance of the witness named, as being material or absent, that the said witness had been subpoenaed to attend the trial of the said cause, or that any effort had been made to have him so subpoenaed; nor did he pretend any cause which would have prevented his procuring the attendance of the said witness; for which reason the said plaintiff objected to my granting the said application to adjourn; and I overruled the same. (*And so, of any other facts stated in the affidavit, with the necessary explanations thereof.*)

Where this affidavit states the evidence, or other matter foreign to the direct command of the writ, and the justice omits a special return thereto, the only way to compel an amendment is by a rule to be obtained on application, and served on the justice. And unless this be done, the party cannot avail himself of such matter in the court above.<sup>(i)</sup> And even though no evidence be returned it is no cause for reversing the judgment: the error must appear affirmatively upon the return.<sup>(j)</sup>

The justice cannot move to quash the writ of certiorari. Its irregularity is none of his concern, and he must obey it at his peril, returning what is legally required of him, and omitting to notice what he is not legally bound to return.<sup>(k)</sup> He should

<sup>(h)</sup> Vide id. & 3 John. 146. 12 id. 299.

<sup>(j)</sup> 12 id. 299.

<sup>(k)</sup> 2 John. cas. 108.

<sup>(i)</sup> 3 John. 439. 12 id. 299.

be careful to give a full history of all such matters as are essential to give his proceedings the character of regularity, and adherence to the statute. Thus, if he state that the jury retired to deliberate on their verdict, he must also return that a constable was sworn to attend them; and should he omit this, the judgment would be reversed.<sup>(l)</sup> And where issue is joined, the return should, upon the same principle, state, that the judgment was rendered after "hearing the proofs and allegations of the parties."<sup>(m)</sup> But the justice cannot be required to state matters of which he is not presumed to be conversant; as the conduct of a jury after they have retired.<sup>(n)</sup> And the court will not require him to return any matter which is altogether immaterial; for instance, a notice of special matter, which might have been given in evidence under the general issue, without such notice.<sup>(o)</sup>

The Supreme Court will, however, in all cases, put such a construction upon the words and phrases used in the return, as will tend to the affirmance, rather than the reversal of the judgment; and will make every warrantable intendment in its favour. Accordingly, where the return omits to state, that the witnesses were sworn, it will be intended that they were, if no objection appear to have been made on this account before the justice.<sup>(p)</sup> And where a justice returned, "that, being convinced by the evidence adduced by the plaintiff, he gave judgment, &c." the court intended that this was legal evidence, given under oath.<sup>(q)</sup> They will not require a technical issue to be returned, though the cause be tried by jury to warrant which, as we have seen,<sup>(r)</sup> an issue is essential; but where it appeared by the return, that the defendant, in some shape or other, resisted the plaintiff's demand, this will be considered equivalent to the joining of an issue.<sup>(s)</sup>

## 2. Of amending the return.

We have already had occasion to mention incidentally, the subject of amending the justice's return. This motion to the Supreme Court, to amend, is, either by the party, where the return is imperfect, in order to compel the justice to supply the defect;<sup>(t)</sup> or else, it may be made in behalf the justice, where he has committed a mistake from the management or imposition of the party or his attorney, or, indeed, where the mistake happens from any other cause.<sup>(u)</sup> In the latter case, the

(l) 2 Caines, 273. id. 135.

(m) id. 96.

(n) 3 id. 106.

(o) id. 84.

(p) 2 John. 378.

(q) 3 id. 439.

(r) Ante, 501, 529.

(s) 1 John. cas. 333.

(t) 3 John. 439. 2 Caines, 384. 1 id. 501.

(u) 2 Caines, 134. 5 John. 350.

return may thus be corrected, either in behalf of the justice, or of the party with his consent, upon an affidavit, which should always state the precise point in which the amendment is sought, (v) in order to enable the court to judge of its materiality. (w) The rule should also contain the particulars, in which such amendment is to be made, in order to instruct the justice where to amend in his own behalf, or to compel an amendment in behalf of the party. And, unless this is the case, it is presumed that the rule would be a perfect nullity.— In the first case, the justice should procure an office copy of the rule for his own sake ; in the latter, it must be served on him by the party, before he is compellable to amend. Where the return is imperfect, the justice may, by arrangement between the parties, gratuitously make a supplementary return, supplying the defect ; but where a motion is made to amend, the usual notice of the motion, &c. must be given to the opposite party. (x) Where a justice made a supplementary return, and then another return contradicting it, the court refused to receive either, and proceeded upon the first. (y) And where he had given a certificate of proceedings in the cause, and afterwards contradicted them by affidavit, the court refused an order to amend according to the certificate. (z) And in all cases, where the first return is precise, specifick and full, a further return cannot be obtained by the party on making an affidavit supplementary to the one on which the certiorari was founded. (a)

These amendments may be ordered at different stages of the suit, according to the circumstances of the case, and the person applying. In one case, a justice was allowed to amend a clerical mistake, on payment of costs, even after the cause had been argued, and the opinion of the Supreme Court had been delivered reversing the judgment. (b) In another case, he was allowed to amend, after the cause had been noticed for argument, upon an affidavit that he was led into the mistake by the management and imposition of the plaintiff's attorney. (c) And the defendant will be allowed, under special circumstances, to move for the amendment of a clerical mistake, even after a joinder in error. (d) But the plaintiff cannot, in general, move to amend after an assignment of errors, and especially, after noticing the cause for argument. (e)

It is not necessary on service of this rule to make out a new return complete. It may be done with less trouble, and with equal effect by a supplemental return.

(v) 3 Caines, 136.

(w) id.

(x) 2 Caines, 258. 5 John, 350.

(y) 7 John, 548.

(z) 3 Caines, 84.

(a) 2 John, 182.

(b) 2 Caines, 134.

(c) 5 John, 350.

(d) 3 Caines, 83.

(e) 2 Caines, 383. 1 John, 493.

## FORM OF A SUPPLEMENTAL RETURN.

## SUPREME COURT.

*Richard Roe*, plaintiff in error, }  
 v. }  
*James Jackson*, defendant in error. }

The further return of *Philip Green*, Esq. one of the justices of the peace of the county of Saratoga, to the writ of certiorari in this cause, pursuant to a rule or order of this honourable court, a copy whereof is hereunto annexed.

I do further certify, &c. (*Go on, and return as authorized or required by the rule.*)

Given under my hand and seal, &c.

*Philip Green*, Justice. (L. S.)

## SECTION II.

## OF THE EFFECT WHICH A CERTIORARI HAS UPON THE EXECUTION IN THE CAUSE.

A writ of certiorari, served before execution, supersedes it, and stays all farther proceedings in the cause before the justice. If the execution be issued before the writ of certiorari is served, on notice thereof to the constable, or other officer holding it, he has then no right to levy, or do any thing under it. It supersedes the execution in the officer's hands, from the time when it is served on the justice, but the officer is not in contempt for proceeding, till he have actual notice of the service.(s)

*Form of notice to the officer to stay execution.*

## JUSTICE'S COURT.

*James Jackson*, }  
 v. } Before *Philip Green*, Esq. Justice of the Peace.  
*Richard Roe*. }



To Thomas Noakes, Constable.

Sir—A writ of certiorari in my behalf, to remove the above cause, was this day served upon the above named justice, at 10 o'clock, A. M. Dated the 12th day of September, 1820.

*Richard Roe.*

On the service of this notice, the officer is authorized to proceed no farther.

But if the officer has begun the execution, before the certiorari is served, as by making a levy or arrest, the writ is no stay ; and the execution may be completed. (t) In such case, where the certiorari is served before the money, if collected on the execution, is paid over to the party, it seems that it ought to be paid in to the justice, to abide the event of the suit. A step like this was directed at the close of the case of *Meriton v. Stevens.* (u)

Where a certiorari issues and is served, before execution taken out, the party may still have his execution in all cases, on giving the security required by the act. (1 N. R. L. 396, s. 17.) The justice may try and determine the competency of the surety offered, upon the same principles, and in the same manner, as where application is made to adjourn, which we noticed ante, 513, 14 ; and, for greater security, he may cause notice to be given to the plaintiff in error, and assign a time for hearing the application, in order to give him an opportunity of opposing the surety upon the ground of incompetency. And he should do this for his own safety, if he have any doubts on the subject. I would suggest the propriety of his assigning the time, and requiring the applicant to give the notice and prove the service of it. Should the surety prove insufficient, the reasoning, ante, 282, would probably apply here.

*Form of the bond.*

Know all men by these presents, that we *James Jackson* and *John Doe*, are held and firmly bound to *Richard Roe*, in the sum of fifty dollars, (*double the amount of judgment.*) to be paid to him, or to his certain attorney, executors, administrators, or assigns ; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals.—  
Dated the 12th day of September, A. D. 1820.

(t) id. 9 John. 66. 17 id. 35.

(u) Willes, 271 to 282.

Whereas, the above bounden *James Jackson*, did, on the 10th day of September instant, recover a judgment against the above named *Richard Roe*, for 25 dollars damages and costs, (*or debt and costs, as the case is,*) before *Philip Green*, Esq. one of the justices of the peace of the county of Saratoga, and whereas the said *Richard Roe* hath sued and prosecuted out of the Supreme Court of judicature of the state of New-York, a certain writ of the people of the said state, commonly called a writ of certiorari, directed to and served upon the said justice, for the purpose of reversing the judgment aforesaid, and other proceedings in the said cause ; *Now therefore*, the condition of this obligation is such, that if the above bounden *James Jackson*, shall well and faithfully restore to the said *Richard Roe*, the said damages (*or debt*) and costs, or such part thereof as shall be collected, and the interest upon the same, from the time of the rendition of the said judgment, (should the said judgment or any part thereof, be collected by any execution to be issued thereon, or otherwise,) then this obligation to be void ; otherwise of force.

*James Jackson*, (L. S.)

*John Doe*. (L. S.)

Sealed and delivered,  
in presence of A B.

On entering into this bond, the party may proceed with his execution, the same as if no certiorari had been sued out.

### SECTION III.

### OF APPEAL.

The remedy by appeal, is given by the 17th section of the "Act to extend the jurisdiction of justices of the peace," (Laws, sess. 41, ch. 94,) and the proceedings are regulated by that, and the three succeeding sections. We have already sufficiently distinguished the cases, in which the remedy by certiorari is applicable.(v) In all other cases an appeal is the proper remedy.

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(v) Ante, 680.

The party appealing must, within four days after judgment, deliver to the justice, personally, a notice of the appeal.

*Form of notice of appeal.*

James Jackson,

v.

Richard Roe.

Sir—Please to take notice, that I appeal from the judgment rendered in this cause, to the Court of Common Pleas, of the county of Saratoga, (or Mayor's Court of the city of ——— if within the jurisdiction of such court.) Dated September 12th, 1820.

RICHARD ROE, Defendant.

To Philip Green, Esq. Justice.

This must be accompanied with the payment to the justice of all the costs of the suit, and 75 cents for making the return.—A bond to the appellee must, at the same time, be executed by the appellant, with one, or more, good and sufficient sureties, to be approved of by the justice, and his approbation indorsed upon the bond. He may determine the competency of the sureties, in the manner we have repeatedly mentioned of other similar proceedings. (w)

*Form of the bond by the appellant.*

Know all men, &c. (form of penalty the same as ante, 687.)

*Condition.*

Whereas judgment has been rendered before Philip Green, Esq. one of the justices of the peace of the county of Saratoga, (or of the city and county, &c.) in favour of the above named James Jackson, against the above bounden Richard Roe, for 30 dollars damages, (or debt) and costs; and whereas the said Richard Roe has appealed from the said judgment, to the Court of Common Pleas of the county of Saratoga, (or to the Mayor's court, &c.) Now, therefore, the condition of this obligation is such, that if the above bounden Richard Roe shall prosecute the said appeal, with all due diligence, to a decision in the said Court of Common Pleas, (or Mayor's court, &c) and shall, moreover, pay to the said James Jackson, the judgment to be rendered on such appeal, with interest thereon, and his, the said James Jackson's costs of such appeal, then this obligation to be void, otherwise of force.

Richard Roe. (L. S.)

John Doe. (L. S.)

*Indorsement thereon.*

I approve of the within named *John Doe*, as surety as within mentioned. Dated the 12th September, 1819.

*Philip Green*, Justice.

If the above requisite be not complied with, the appeal is of no validity, but, on being performed, they supersede any further proceeding before the justice, and if the goods, or body be taken in execution, they are also discharged, on giving the proper notice from the justice to the constable or gaoler, and the payment of fees, &c.

*Form of notice of appeal to constable or gaoler in order to discharge the goods or body from execution.*

*James Jackson,* }

v.

*Richard Roe.* }

To all whom it may concern: I, *Philip Green*, one of the justices of the peace of the county of Saratoga, (or of the city and county of ———,) before whom the above cause was tried and judgment therein rendered, do certify, that an appeal from the said judgment, to the next Court of Common Pleas, of the said county, (or the Mayor's court, &c.) has been made in the said cause, according to law. Dated September 12th, 1820.

*Philip Green*, Justice.

In serving this notice, deliver it to the constable or gaoler personally.

Within ten days after the appeal, the justice must make out his return.

*Form of return on appeal.*

*James Jackson,* }

v.

*Richard Roe.* }

To the honourable the Court of Common Pleas of the county of Saratoga; I, *Philip Green*, Esq. one of the justices of the peace of the said county, before whom the above cause was tried, do certify, that the demand of the said plaintiff in the said cause, was exhibited to me, and set forth, in a declaration in the following words: (*take in declaration verbatim.*) And also, an account as follows: (*if any, setting it forth verbatim.*) To the said declaration and demand, the said defendant thereupon pleaded in the following words: (*take in the plea or pleas verba-*



*im.*) and also gave notice in the following words : (*take in notice of special matter, set off, &c. if any ;*) and at the same time exhibited the following account, as his demand against the said plaintiff : (*here take in account verbatim.*)

To the second plea of the said defendant, the plaintiff thereupon replied as follows : (*take in replication and other pleadings, so as to exhibit the issue between the parties.*)

And thereupon issue was joined between the said parties ; and the said cause came on to be tried before me, on the 10th day of September, A. D. 1820, at my office in the town of Saratoga Springs, in the said county, by a jury, consisting of the following persons, viz. *Amos Peters, &c.* (*take in names of jurors.*) And upon that trial, the following witnesses were sworn and examined on the part of the plaintiff, viz. (*names of the plaintiff's witnesses,*) and the following persons were offered as witnesses on the part of the plaintiff, but rejected by me as incompetent, viz. (*names of witnesses rejected.*) The following persons were sworn and examined, as witnesses on the part of the defendant, viz. (*names of the defendant's witnesses.*)

The said plaintiff also gave in evidence on the trial aforesaid, a certain bill of sale, executed by one *Amos Knox*, to the said plaintiff, for a cow, dated on the 1st day of July, A. D. 1820.— The defendant also gave in evidence on the trial aforesaid, a certain execution, issued by one *Peter Thompson*, one of the justices of the peace of the county of Saratoga, against one *James Denn*, in favour of one *Ira Fenn*, for 15 dollars, which execution was dated the 2d day of July, A. D. 1820.

The said defendant farther offered in evidence, a certain promissory note, given by one *James Denn*, to him, the said defendant, for 5 dollars, dated the 1st day of June, A. D. 1820, which I rejected, as inadmissible evidence for him the said defendant.

The plaintiff admitted on the trial aforesaid, that the said cow, mentioned in the said bill of sales, had been duly and regularly levied upon, and sold at public auction, under and by virtue of the aforesaid execution, by one *Thomas Noakes*, constable, and that the said defendant became the purchaser thereof, under the said execution.

The said jury found a verdict for the said plaintiff, of 26 dollars damages, and I gave judgment, that the said plaintiff recover the damages aforesaid, with 4 dollars, being the said plaintiff's costs by him expended about the prosecution of his said suit. Given under my hand at the town of Saratoga Springs, in the said county, the 20th day of September, A. D. 1820.

*Philip Green, Justice.*

This return, with the surety bond, must be filed by the justice in the clerk's office, of his city or county, at or before the Court of Common Pleas, or Mayor's Court, next after the expiration of the said ten days.

Besides the matters explicitly pointed out by the statute, as necessary to be returned by the justice, it has been decided, that where any *admission* is made by either of the parties, in the course of the proceedings before the justice, such admission should be returned, and operates as conclusive evidence, in the court to which the cause is carried by appeal of the truth of the matter admitted (*x*). And unless this matter be so returned, it is plain that the opposite party would, many times, be altogether deprived of the benefit arising from its use in the court above.

"*Witnesses*," in a technical sense, are persons sworn to testify, or offered to testify in a cause. But it is apparent that the legislature, in the act under consideration, meant to use the expression in a more comprehensive sense, as synonymous with evidence (*y*). Accordingly, *documentary*, (i. e. *written*) evidence, not offered in the justice's court, is inadmissible in the court above; and within this rule, it has been decided, that where the plaintiff, in the court below, omitted to give an execution in evidence, which was a material part of his proof, he could not be permitted to use this evidence on the hearing upon an appeal. (*z*) And as the court above are required to hear the cause on "an examination of the *witnesses* named in the return, &c." (*a*) it follows, that no documentary evidence, though offered or given in the court below, can be received on the hearing upon appeal, unless it be *named*, or *described* in the return, as evidence offered or given in the court below.

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(*x*) 17 John. 130.

(*y*) 18 id. 339, per Spencer, Ch. J.

(*z*) 18 id. 338.

(*a*) Laws, sess. 41, ch. 34, s. 19.

## CHAPTER XVII.

### OF AMENDMENTS AND JEOfAILS.

THE statute of *amendments* and *jeofails*, which may be seen at large in 1 N. R. L. 117, &c. is extended, by express provision to a justice's court, as far as it is applicable. (b) A justice, being, moreover, invested with all such power, for the purpose of holding his court, and hearing, trying and determining all such actions as are cognizable before him, as is usual in our courts of record, (c) it becomes an interesting inquiry, what are the powers of a justice in supplying the defects in his proceedings by amendment?

*Jeofails* signifies an oversight in pleading, or other law proceedings; (d) and it was to enlarge the powers of the courts, in amending and supplying failures, mistakes, omissions, &c. that the above statute was made.

1. At common law, and independent of the statute, while the parties are going on with their pleadings before him, in order to an issue, as the declaration, plea, replication, &c. or the defendant's notice of special matter, or set off, the justice may, without doubt, suffer the parties to amend from time to time, at his discretion, till the pleading or notice shall be perfect. Thus, should the defendant demur to my declaration, and the justice think it insufficient, he may suffer me to amend, (e) and so of any other pleading or notice, adjudged, or supposed to be insufficient. And this is a power which ought to be freely and liberally exerted by the justice, where he believes the party acts in good faith; otherwise he might lose his cause, or fail in his defence, for mere want of skill, which the law itself, by sending him to this tribunal, does not suppose him to possess. And it is, moreover, greatly in ease of the magistrate, who, if he has any doubts as to the goodness of the pleading demurred, or objected to, can allow and direct the party wherein to amend, as often as he pleases. The ancient mode of pleading seems to have been brought back by the institution of this court. It is said that anciently, "all pleas were *ore tenus*, at the bar, and then, if any error was spied in them it was presently amended." (g) But this power at the common law was confined to the term at which

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(b) 1 N. R. L. 397, s. 17.

(c) *id.* 327, s. 1.

(d) Jac. L. D. tit. *Jeofails*.

(e) 10 Mod. 83. 2 Caines, 233.

(g) 10 Mod. 83.

the proceeding took place, and consequently could not be exercised after continuance, <sup>(h)</sup> which answers to the adjournment of a justice.

II. This common law power, being very limited, the statute of amendments and jeofails, was enacted, which so far as it is concerned to operate in a justice's court, we shall consider in its application, 1, to process, pannel or return, 2, to the verdict, and 3, to the judgment.

1. The statute <sup>(i)</sup> provides, that all, which appears to be the misprision of the clerk, in any writ, shall be amended, and it may be hence, I think, laid down, as a general rule, that wherever the justice commits a mistake in the summons, warrant, attachment, &c. as in the date, direction, firm, &c. it may be amended, according to the fact, and the instructions of the plaintiff, originally given to the justice, in relation to the issuing such process. In the direction ; as if a justice, living in Saratoga county, should, by mistake, direct his process to any constable of Washington county, <sup>(j)</sup> the rest of the process being full and significant. So, where there is more than twelve days between the date and return of summons, provided it, in fact, issued on the right day. <sup>(k)</sup> For when a justice is directed to make out process, this contains an implied instruction to make it out correctly. <sup>(l)</sup> And process, issued against A and B, joint debtors, and served only on A, the real debtors being A and C, may be amended by inserting C's name in stead of B, so as to make the process run against A and C, instead of A and B. <sup>(m)</sup> And, in one case, in the English court of Common Pleas, the defendant, whose real name was *Augustus Richard Butler Danvers*, was arrested on a *capias*, (which answers to a justice's process to bring the defendant into court) by the name of *George Augustus Richard Danvers*, it appearing, that the plaintiff had the right name, by an affidavit which he had drawn in order to hold the defendant to bail, and the mistake in the name, consequently, being merely that of the clerk, the court amended the writ, by making the name right, even though the bail were concerned in the proceeding. <sup>(n)</sup> This was after service of the *capias*, and on exception taken by the defendant. In an earlier case, in the same court, the defendant pleaded a misnomer in abatement, but, it appearing that the right name was given to the clerk, to make out the writ by, the mistake was amended. <sup>(o)</sup> In the King's Bench, the writ was in *debt* only, whereas, according to the forms of the court, it should have

<sup>(h)</sup> 8 Co. 157, & vide 15 John. 304. <sup>(l)</sup> 2 Black. Rep. 918.

<sup>(i)</sup> 1 N. R. L. 117, s. 1.

<sup>(m)</sup> 7 T. R. 295.

<sup>(j)</sup> 17 John. 63.

<sup>(n)</sup> 2 Bos. & Pull. 109.

<sup>(k)</sup> 3 Wils. 454. 2 Black. Rep. 918. <sup>(o)</sup> 2 Ventries, 46.



been *trespass*, and also *debt* : The court, on exception taken, ordered *trespass* to be inserted.(p) Suppose a summons, instead of being, to appear before P G, at his office in the town of *Saratoga Springs*, should be, at his office, the town of *Saratoga Springs*, omitting the word *in* : this, or any, the like mistake of the justice, might be amended, on exception being taken.(q) Judgment against *Edward*, and the execution against *Edmund* by mistake : the English Court of Common Pleas, ordered the execution to be amended, by substituting *Edward* for *Edmund*, so as to make it agree with the judgment.(r)

In a late case in the King's Bench, the defendant, whose real name was *Maurice Jacob Hertz*, was sued by the name of *Moses Isaac Hertz*. He pleaded this misnomer in abatement, and the court ordered the writ to be amended, so as to be in the right name, though the counsel insisted, that this would do away all pleas of misnomer, and in the argument of that cause, the cases, as to amending mistakes in names, are very fully cited by the attorney general and *Marryat*.(s)

As to the jury process, or *venire*, if it be of the proper place, the proper action and between the proper parties, all other faults may be amended.(t) And a wrong christian name, or sir name in the pannel, may be amended, if proved to be the man intended.(u) A direction of the *venire* to an improper officer, as to any constable of the county, if the *venire* be executed by the proper officer, will be aided after verdict.(v) And the Supreme Court have laid down the general rule, that irregularities in the contents or in the execution of jury process, are amendable.(w)

The execution may be amended, by altering the sum, so as to make it agree with the judgment.(x) So of a mistake in the time of its return.(y) So the return of an officer to an execution, may be amended, according to the fact.(z) An execution burnt, or otherwise destroyed by accident, may be supplied by a new one.(a) It was held in one case, that an execution might be amended even after the defendant is taken upon it,(b) and after an action of false imprisonment, on account of its irregularity.(c) And an execution was amended twice in succession, in order to make it correspond with the judgment.(d)

(p) 1 Blac. Rep. 462.

(q) Cro. Eliz. 644.

(r) Barnes, 10.

(s) 3 Maule & Selw. 450.

(t) Bac. Ab. tit. amendment. (D) 4.

(u) id. & cases there cited. n. (b)

(v) id. 13 John. 227.

(w) Pr. Kent, Ch. J. 1 Caines, 587.

(x) 5 John. 89. 3 Caines, 98.

(y) 9 John. 386.

(z) 5 John. 163.

(a) 3 id. 448.

(b) id. 144. 2 Blac. Rep. 836.

(c) 3 Caines, 98.

(d) Coleman, 59.

As to the return of the officer on process, if defective, it may, in general, be amended according to the fact.(e)

2. As to the verdict, if the justice make a mistake in entering it, he may correct his entry, by making it agree with the real verdict ; as if he mistake the amount, or, where the verdict is for the plaintiff on one count, and for the defendant on another, and the justice enters it for the plaintiff or defendant generally, and so in like cases.(f)

3. As to the final judgment, a mere miscast in the amount of costs, or damages and costs, may be amended.(g)

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(e) Vide Dalton's sheriff, c. 41, & (g) 3 Bulstrode, 114. the cases there cited.

(f) Vide Bac. abridg. tit. amendment. (D) 5, & the cases there cited.

## APPENDIX.

A few of the following cases, &c. were omitted by mistake, in the preceding volume, but have mostly been reported since that part of the work to which they relate, had gone to press. I, therefore, give them here, with the page containing the head to which they belong.

p. 13.—Though consent may take away error, it cannot confer jurisdiction. Per Kent, C. J. 17 John. 471.

p. 21, & 370.—A one horse waggon with a spring seat, and pannelled sides, and which is not used for farming purposes, or carrying goods, is a pleasure carriage within the meaning of the act to establish the *Seneca Turnpike road company*, passed April 1, 1800, (2 K. & R. ed. L. 412. 423, sess. 23, ch. 78, s. 11.) The toll thereof is 12 1-2 cents, and no penalty is, consequently, recoverable for taking that sum. 18 John. 128.

p. 38.—One promises another 100 dollars, if he will swear that it is due, which he does. This promise is binding, though the affidavit be mistaken, or false. 18 John 337.

p. 44.—A special agent cannot bind his principal, by any act beyond his authority : accordingly, a clerk in a retail store, cannot sell goods out of the ordinary course of retail business. And if he does so, the purchaser acquires no right : the act is void. 18 John. 363.

“ A *general agent* is a person whom a man puts in his place to transact all his business of a particular kind ; as to buy and sell certain kinds of wares, to negotiate certain contracts, &c. but a *special agent* is employed about one specific act or specific acts only.” Paley’s Prin. & Ag. 162, 3, 4. Lond. ed. 1819. And vide 15 East, 408, per Ld. *Ellenborough*, C. J.

p. 39.—Blood, or natural affection, is not a sufficient consideration to support a promissory note, or other simple executory contract. 18 John. 145.

p. 47.—Where it does not appear that a publick agent, in making a contract, acts expressly, or ostensibly as a publick

agent, it will be deemed a private contract. 13 John. 313.  
Vide 18 John. 122.

- p. 50.—Where one partner assigns all his stock, the partnership is dissolved : and he cannot be restrained by a covenant in the articles, from exercising the power to make such an assignment. 17 John. 525.
- p. 51.—Where an act passes to divide one town into two, and contains the usual provision for the division of the poor, and poor money, &c. the officers have no power to bind themselves, or their successors, by an agreement, that the whole of the paupers or any of them shall be supported by both towns. 18 John. 382.

Overseers are not personally liable upon a contract for keeping a pauper, &c. if it do not appear expressly, that they intended to bind themselves personally. 18 John. 122. And vide 13 John. 313. They should, therefore, be sued as overseers, and styled so in the proceedings ; and so of any publick agent. *id.*

Where a pauper is removed by order of justices from one town to another, which order is quashed by the sessions, no action lies, under any circumstances, to recover for the keeping of the pauper, by the town to which he is so removed, though he be there taken sick and be incapable of removal. 18 John. 407.

- p. 74.—A suit will lie for money had and received against an officer for money collected on execution, without any previous demand. 18 John. 133.
- p. 88.—The defendants, pursuant to agreement, indorsed a blank paper, to be filled up with a note of 2000 dollars, but which the plaintiff caused to be filled up with one of 4000 dollars.—This note was held void. 18 John. 167.
- p. 95.—A promissory note, made as a gift, is void, for want of consideration. 18 John. 145.
- p. 92.—When the holder fills up a blank indorsement with the name of an indorsee, for the purposes of *collection* merely, and the note is returned to him protested, he may strike out the special indorsement, and make it payable to himself, and sue an indorser thereon in his own name. 18 John. 230.
- p. 103.—A demand of payment upon a note, payable at the bank, on the day it falls due, though after banking hours, is



regular, if this be the course of doing business at the bank. 18 John. 230.

p. 88.—After a note is made and indorsed, though the maker alter it, without the consent of the indorser, so as to make it payable at a particular place, at which place it is demanded, this is sufficient to charge the indorser. 18 John. 315. But this decision has since, I understand, been reversed by the court of errors.

p. 112.—A demand of payment may be made, and notice to the indorser given, by a notary, or any person having a parol authority for that purpose ; or the lawful possession of the note is sufficient. 18 John. 230.

The earliest possible notice to an indorser is not necessary ; if reasonable diligence be used, it is enough. 18 John. 230.

p. 163.—The lien for freight on a cargo is waived where the time and manner of paying freight is regulated by stipulation in a charter party, especially if the cargo is deliverable before the time of payment arrives. 18 John. 162.

p. 166.—Selling goods, or even carrying them to an auction to sell, is a conversion. 18 John. 163, 4, per Spencer, C. J.

p. 167.—An injury immediate, though negligent, will sustain an action of trespass, (e. g.) negligence in managing a vessel, by which another is injured. 18 John. 257.

p. 181.—An action on the case, will not lie against the captain or commandant of a company, for improperly returning the name of a person exempt, to a court martial, by which he is fined, unless malice be shown. 11 John. 83.

Nor will an action lie without showing malice, against the inspectors of an election for refusing a vote. 11 John. 114.

It is the duty of commissioners, but not overseers of highways to repair bridges. And this duty is not absolute, but qualified, and does not attach, unless the commissioners have money in hand for forfeitures and penalties, or which has been paid over to them under the direction of the supervisors. And it seems that, in no case, is a commissioner or overseer liable to an action for private damages arising from not repairing a bridge, and it is the

same with regard to roads. Vide opinion of Kent, Ch. 17 John. 446 to 458.

- p. 182.—An action on the case lies against the agents and workmen of a turnpike company, who, in repairing the road, negligently injure the owner of the land through which it runs. 18 John. 405.
- p. 186.—Where a *chose* in action is left with me as security for a debt, I am not accountable, under any circumstances, for refusing to take a collateral article in payment thereof, though the claim thereon be lost by my refusal. 17 John. 539.
- p. 372.—Where there is an express contract for a stipulated amount and mode of compensation for the services rendered; as "100 dollars per month, and 7 tons privilege," the plaintiff must declare specially, and cannot resort to a general count for work and labour, &c. 18 John. 173, 4, per Platt, J.
- p. 484.—If a defendant is at the day and place, offering payment, it lies with him to show this fact; and if a payment be at the bank, he must wait till the usual time of day for presenting notes at the bank. 18 John. 230.
- p. 492.—Where an act authorizes a turnpike company to erect a gate near a certain place, erecting one 2 miles and 3-4 distance therefrom is not a compliance with this provision; and does not entitle the company to toll. 18 John. 397. And an action for money had and received, lies to recover back toll paid at such a gate.

And when such a company have power to erect a gate at a place to be determined in their discretion: having once placed the gate, determines their election, and they cannot remove it, unless there be some pressing necessity therefor. 18 John. 397.

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